UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN EAGLE PROTECTIVE SERVICES CORPORATION AND PARAGON SYSTEMS, INC., JOINT EMPLOYERS

and Case 5-CA-126739

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL 034, AFFILIATED WITH UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL UNION

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for the General Counsel.
Thomas P. Dowd, ESQ., of Washington, D.C.
for the Respondent.
Jeffrey C. Miller, of Westminster, Colorado,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eric M. Fine, Administrative Law Judge. This case was tried in Washington, D.C. on February 18 and 19, 2015. The United Government Security Officers of America, Local 034, Affiliated with United Government Security Officers of America International Union (the Union) filed the initial charge against American Eagle Protective Services Corporation (AEPS) on April 16, 2014, and the first amended charge against AEPS and Paragon Systems, Inc. (Paragon), Joint Employers on April 28, 2014.[1] The complaint issued on November 26, 2014, alleges AEPS and Paragon (collectively referred to as Respondents) are joint employers. The complaint alleges Respondents have violated Section 8(a)(5) and (1) of the Act by, without bargaining with the Union, since October 28: (a) changing the threshold for full-time status from 32 to 40 hours; (b) reducing employee's regularly scheduled work hours upon changing the definition of full-time status; (c) discontinuing the option of paying health and welfare benefits directly into employees paychecks; (d) changing break structures and reducing the number of paid breaks; (e) reducing the rate of training pay; (f) discontinuing providing a uniform and shoe allowance; and (g) changing paydays from bi-weekly to bi-monthly.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the General Counsel and the Respondents, I make the following:[2]

[1] All dates are in 2013 unless otherwise indicated.

[2] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2)), reversed on other grounds 340 U.S. 474 (1951).

Findings of Fact

I. JURISDICTION

AEPS, a corporation, with an office and place of business in Austin, Texas, and Paragon, a corporation, with an office and place of business in Herdon, Virginia, each have been engaged in the business of providing security services to commercial and governmental entities, including at the United States Department of Agriculture (USDA) headquarters in Washington, D.C.. Annually AEPS and Paragon each performed services valued in excess of $50,000 in states outside of the District of Columbia. Respondents admit and I find that AEPS and Paragon are each are employers engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At the outset of the hearing, the parties entered into evidence a written stipulation, which reach reads, in part, as follows:

> 1. In August 2013, the U.S. Department of Agriculture awarded American Eagle Protective Services Corporation (AEPS) a federal contract (AG-3144-C-13-0003) to provide guard services at the USDA Headquarters facility, which consists of the South Building, the Whitten Building, the Yates Building and the George Washington Carver Center.
> 2. Under the federal contract, AEPS was scheduled to take over operational control of the USDA Headquarters facility effective October 28, 2013 replacing USEC, Inc. and USEC's subcontractor Securiguard, Inc.
> 3. AEPS awarded Paragon Systems, Inc. a subcontract in August 2013 to perform certain security work at the USDA Headquarters facility. Under the terms of the subcontract agreement, Paragon provided security services at the Whitten Building, the Yates Building and the Carver Center while AEPS was responsible for providing guard services at the South Building.
> 4. AEPS and Paragon are joint employers on the USDA Headquarters federal contract, as defined under the National Labor Relations Act.[3]
> 5. United Government Security Officers of America, Local 034 (the Union) was the certified bargaining representative for the protective service officers (PSOs) who worked for USEC and Securiguard at the South Building and at the Whitten Building prior to October 28, 2013. The Union had a collective bargaining agreement with USEC and Securiguard effective for the period of time covering October 1, 2011 through September 30, 2014 (hereinafter the Predecessor CBA).
> 6. As federal contractors on a service contract, AEPS and Paragon were subject to the requirements of Executive Order 13495, Non-Displacement of Qualified Workers as well as the McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 351–358.[4]

[3] Respondents admit in their answer to the complaint that, "At all material times, AEPS has exercised control over the labor relations policy of Paragon and administered a common labor policy with Paragon for the employees of AEPS and Paragon."

[4] Respondents admit in their answer to the complaint that under Executive Order 13495, Respondents were obligated and planned to offer employees of their predecessors USEC and Securiguard a right of first refusal of employment in positions for which they were qualified.

7. In August 2013, after AEPS was awarded the USDA federal contract and after Paragon was awarded the related subcontract, AEPS/Paragon arranged for job fairs to be held for incumbent employees who were working on the USDA federal contract. Paragon held job fairs for incumbents on September 14, 2013 and September 29, 2013 off-site at the Marriott Hotel in Greenbelt, Maryland.

8. At the Paragon job fairs in Greenbelt, applicants who had not yet completed applications were given the opportunity to do so on-line, and all incumbent PSOs who completed applications were provided with contingent offer letters that were identical in content for all incumbents, other than being personalized with the incumbent's name and address in the title of the letter and at the acknowledging signature block for each incumbent. Incumbents were then asked to complete other new hire paperwork, including federal and state tax documents, direct deposit authorization, employment eligibility verification, and other documents acknowledging receipts of Paragon policies and procedures.

9. Paragon has a variety of other federal contracts with the Federal Protective Service to provide guard services at federal buildings in the Washington, D.C. area. As a result, throughout 2013, Paragon placed advertisements on Monster.com and other applicant-related publications seeking applicants for any positions that might become available on its federal contract in the event that incumbents did not accept the employment offers extended by Paragon at the Job Fair meeting.

10. On or about September, 2013, AEPS placed an advertisement on its website seeking security guards for the USDA contract.

11. Paragon subsequently held a New Hire Orientation meeting on October 19, 2013 for employees who had been hired to fill PSO positions at the USDA Buildings. At this meeting, PSOs were given copies of Paragon's Security Officer Handbook and a presentation regarding employment at Paragon.

12. On October 26, 2013, in the Jefferson Auditorium, AEPS/Paragon employees attended a quarterly meeting presented by USDA representatives. Following the quarterly meeting, AEPS held a New Hire Orientation for which both Paragon and AEPS employees were present.

13. Article 7.1 of the Predecessor CBA states, in relevant part, that a "full-time employee" shall be considered an individual regularly scheduled to work and regularly work 32 or more hours per regular workweek, less holidays. When AEPS/Paragon assumed operational control on October 28, 2013, Paragon defined a "full-time employee" to be an individual who regularly works a minimum of 40 or more hours per week on a continuing basis.

14. Article 12.1 of the Predecessor CBA states, in relevant part, that employees will receive a Health and Welfare payment on all hours paid up to 40 hours per week and 2,080 hours per contract year. The Predecessor CBA states that the employer will continue the practice of paying the Health and Welfare payments on the employee's check, unless otherwise directed by the employee in accordance with the employee's election to participate in other fringe benefit options. When AEPS/Paragon assumed operational control on October 28, 2013, AEPS/Paragon did not provide employees with the option of receiving the Health and Welfare payments on their checks. Instead, AEPS/Paragon offered employees the option of applying the Health and Welfare payment to an AEPS/Paragon health plan with any excess fringe benefit amount directed into the employee's 401(k) account, or, alternatively, having the entirety of the Health and Welfare payment directed into the employee's 401(k) if the employee demonstrated health care coverage from another source.

15. Article 7.6 of the Predecessor CBA states, in relevant part, that employees shall receive two (2) 15-minute paid rest periods and one (1) 30-minute paid lunch period for each 8-hour shift when properly relieved. The Predecessor CBA further states that

employees shall receive an additional 15-minute paid rest period for every four (4) hours worked by an employee past the employee's regular 8-hour shift. When AEPS/Paragon assumed operational control on October 28, 2013, AEPS/Paragon implemented a break structure that was different from the break structure set forth in the Predecessor CBA.

16. Article 15.3 of the Predecessor CBA states, in relevant part, that employees participating in required training and testing shall be paid appropriate wages. The Union and USEC/Securiguard had an established past practice wherein employees would receive their base pay rate for attending required training and testing. When AEPS/Paragon assumed operational control on October 28, 2013, AEPS/Paragon paid employees $8.25 per hour for attending required training and testing.

17. Article 12.4 of the Predecessor CBA states, in relevant part, that the employees shall receive a uniform allowance of forty cents ($0.40) per hour worked. These monies were paid to employees as wages in their paychecks. When AEPS/Paragon assumed operational control on October 28, 2013, AEPS/Paragon did not provide an hourly uniform allowance

18. Article 12.4 of the Predecessor CBA further states, in relevant part, that employees may receive shoe allowance as a reimbursable expense, up to $100 per year. When AEPS/Paragon assumed operational control on October 28, 2013, AEPS did not provide a shoe allowance.

19. Article 8.2 of the Predecessor CBA states, in relevant part, that employees will be paid on a biweekly basis, subject to change by mutual agreement. When AEPS/Paragon assumed operational control on October 28, 2013, AEPS paid employees twice monthly, while Paragon continued paying employees on a biweekly basis.

20. The differing terms and conditions of employment described in paragraphs 13-19 were announced and implemented without bargaining with the Union.

21. AEPS/ Paragon assumed operational control of security for the USDA Building on October 28, 2013 with a workforce consisting of a majority of PSOs who formerly worked for Securiguard/USEC at the USDA Building.

22. Thereafter, AEPS/Paragon recognized the Union as the collective bargaining representative of the PSOs at the USDA Building and bargained with the Union for a new collective bargaining agreement.

23. AEPS/Paragon and the Union reached a collective-bargaining agreement on or about October 16, 2014 covering the time period of October 16, 2014 through October 27, 2017.

A. The General Counsel's Witnesses

James Jones began working for Paragon as a special police officer (SPO) on October 28, at the USDA Whitten Building, which is staffed by Paragon. Jones has been employed at the USDA buildings as an SPO since 2002 for prior contractors. Jones testified other bargaining unit employees work in the South Building which is staffed by AEPS. Jones testified the project manager for the SPOs at USDA is Joey Ortman, who is employed by AEPS.[5] At the time of his testimony, Jones held the position of treasurer of the Union and he had been a shop steward since 2005.

Jones learned in early August 2013 that AEPS and Paragon would be taking over the security contract at USDA. Jones testified as follows: On September 3, Jones reported for duty

[5] Respondents admitted in their answer to the complaint, that Ortman has the title Project Manager, AEPS, and that he is supervisor and agent for the Respondents as defined in Section 2(11) and 2(13) of the Act.

at the daily pre-shift meeting known as a guard mount, and Lt. Hayes instructed the SPOs to look at the bulletin board to see if their name was listed for Paragon. The instructions on the posted memo were to report to a job fair on September 14. Hayes said if someone's name was not on the list, they would be working for AEPS and would receive information later. The September 3 memo stated the job fair was going to be at the Marriott in Greenbelt, Maryland. Neither AEPS nor Paragon's logos were on the memo. There were about 10 or 15 names on the memo. Jones identified two additional memos containing the name "Paragon Systems." It states in the first memo that Paragon would be holding a "Job Fair" on September 14, and in the second memo that Paragon would be holding a job fair on September 29. Jones testified these memos were distributed at work. Jones testified he had to complete an employment application on line prior to attending the Paragon September 14 job fair. Jones learned about completing the application from the supervisors and from the memos. The second memo announcing the September 14 Paragon job fair stated it would take place at the Greenbelt Marriott, and gave time frames for the guard's arrivals based on an alphabetized listing. The memo stated "Paragon Systems is currently accepting applications from incumbent Security Officers only. To be considered for employment, incumbents MUST complete all parts of the Paragon application process no later than 24 hours before the job fair." The memo directed applicants to two websites as to where to complete the application. It stated the applicants must bring an original and copy of the following documents to the job fair: driver's licenses or state ID; social security card; birth certificate, passport or naturalization; high school diploma, transcript or GED certificate; DD-214, if applicable; void check or bank letter signed by a bank representative. The memo stated, "Offers of employment are contingent upon successfully passing all pre-employment requirements, attending all scheduled training and passing all contract-required performance standards. A medical exam and a drug screen are also required."[6]

Jones applied online to Paragon as directed in the described memos. Jones testified when he filled out the application there was nothing indicating his terms of employment existing at USEC would change with Paragon. Jones testified the only thing it said was that they would be "at will" employees. Jones testified the on line application did not mention anything about the following: shoe allowance, training pay, a change in how they would receive their health and welfare benefit, break structure, or threshold for full-time employment. However, the applicant signature page of the Paragon's application submitted into evidence contains the following:

> If hired, I agree and understand that I will conform with the policies, practices and procedures of Paragon. I further agree that my employment is "at-will." This means that either Paragon or I may terminate the employment relationship at any time, with or without notice, and with or without cause. I understand that Paragon retains the right to establish compensation, benefits and working conditions for all of its employees. Accordingly, I understand and agree that Paragon retains the sole right to modify my compensation and benefits, position, duties, and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate. No employee or representative of Paragon, other than the President of Paragon, Inc. has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing.
>
> I acknowledge that I have been given the opportunity to ask questions regarding Paragon's policies and procedures, and my potential status as an employee "at-will," and no Paragon representative has promised or implied to me that if I am hired, I will be employed under any terms other that stated above. I agree that this constitutes an

[6] The memo announcing Paragon's September 29 job fair was largely duplicative of the second memo announcing the September 14 job fair described above.

integrated, binding agreement with respect to the "at-will" nature of my employment relationship.

Jones attended the Paragon job fair held on September 14. Jones testified as follows: No AEPS applicants attended and there were no SPO's in attendance who were not working for the then incumbent employers. Paragon representatives attended the event, including two men who were doing uniform sizing and handing out hiring packets. Paragon officials Rick Waddell and Lori Raines were in attendance.[7] Jones testified that: When he arrived, Jones was asked his name and whether he filled out the online application to which he said yes. Jones was given a hiring packet containing his name, told to fill it out, and then see human resources. Included in the packet was a Paragon offer letter for employment, a direct deposit authorization form, and federal and state tax forms. Jones recalled there were two policies in the packet, one for sexual harassment and the other for workplace violence.

The September 14 offer letter stated Jones was being extended, on behalf of Paragon, a contingent offer of employment with an effective date of October 28. There was an appendix attached setting forth base pay and other benefits. It stated Jones would be offered the company's sponsored health/dental benefits under the terms of the company's plan. It stated if Jones chose not to receive health and medical coverage, the health and welfare hourly rate indicated in the appendix would automatically be contributed into a company sponsored 401(k) retirement plan, pre-tax, for Jones' benefit. It stated, "You will not have the option of receiving a cash payment in lieu of health and retirement benefits." The letter stated, "Shift schedules will be determined in accordance with the operational needs of the contract. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements and subject to the operational needs of the contract." The letter stated vacation as specified in the appendix will vest after a year of continuous employment with the company and its predecessors. The letter stated Paragon considers a full time employee one who works an average of 40 hours per week. It stated employment is contingent on successfully passing all pre-employment requirements, with certain requirements listed. It was stated Jones' employment would be at will, with a description of what that meant. It stated that, in compliance with Executive Order 13495, "you are hereby given a first right of refusal for this job opening." It stated the offer of employment must be accepted by October 1, by tendering a copy of the applicant's acceptance by certain specified methods. Jones offer letter was the same in content as all offer letters tendered by Paragon to the predecessors' employees. Jones signed and turned in his offer letter on September 14, along with the hiring packet. Jones testified, after he filled out the hiring packet, he reviewed the packet with Raines and then gave it to her. Jones testified he had been requested to bring his driver's license, birth certificate, passport, social security card, diploma, and a voided check for direct deposit, all of which he presented to Raines. Jones met with Raines for about 15 minutes. Jones testified Raines said "congratulations, welcome to the company" and she told him to go back out front to get sized for his uniform. Raines told Jones he would be hearing about an orientation meeting. Jones left after he was sized for the uniform and hat. Jones testified Raines did not ask him any questions about his work history, education, or his strengths or weaknesses. She did not ask him why he wanted to be employed by Paragon.[8]

[7] Respondents admit in their complaint answer that Waddell and Raines are supervisors and agents of the Respondents, with Waddell's title as project manager; and Raines' title as human resources generalist.

[8] I have concluded based on Jones' credited testimony that he was not interviewed for the position, but rather Raines just reviewed his paper work with him to ensure it was complete.

Jones testified, on re-direct exam, that: Jones phoned Ortman on September 14, shortly after Jones left the job fair. Jones knew Ortman had been hired as project manager for AEPS at the time of the call. Jones had submitted his signed offer letter accepting employment with Paragon prior to the call. Jones told Ortman about the offer letter and Ortman asked what it said. Jones told Ortman what it said and Ortman stated that "American Eagle was the prime and that nothing was going to change, everything was going to stay structurally the same, and not to worry about it." Jones testified he told Ortman about the offer letter "because it was a grave concern of a lot of officers." Jones testified he told Ortman about Paragon taking their health and welfare stating that was the main concern. Jones testified Ortman said Paragon is the subprime and AEPS is the prime, and they have to do what AEPS does. Jones testified that as of September 14, he did not know what AEPS was going to do as no employee had contact with AEPS. Jones testified the employees at the time "didn't know it was going to be different. Their thing was that everything was supposed to stay the same, just changing shirts."

Jones testified, after the job fair, his next contact about Paragon was Lt Hayes telling Jones about an orientation meeting. Hayes told Jones during a guard amount to look at the bulletin board for his name and for the date for orientation. Jones testified that: The memo on the bulletin board had a list of names, the date, and the location for the orientation. Jones received an additional memo at a later date, under Paragon's letter head stating that on October 19, there was a mandatory new hire orientation at the Greenbelt Marriott which could take between 2 and 3 hours. Jones attended October 19 orientation. It was for future Paragon employees only and it was attended only by incumbent employees of the prior contractors. Future AEPS employees did not attend. Jones was given documents at the new hire orientation including: a Paragon employment handbook, and a folder for the benefit package. Waddell spoke at the meeting, and one officer asked whether they could wear the boots they were already wearing or if the boots had to be company issued. Waddell said company boots had to be worn unless it was okayed by the government. However, Jones testified he currently does not wear company issued boots and he has never been disciplined for not doing so. During the meeting, Raines also spoke. Jones testified that neither said anything about training pay rate, unpaid lunch breaks, uniform allowance, or shoe allowance. Jones testified, during the meeting, the floor was opened for questions. One officer asked about the health plan and whether if they already had their own health insurance could they still be paid a cash payment in their paycheck. The response was no it would be put in a 401(k) plan. After the presentation was complete, Raines told the officers they could go to the parking lot and get their uniforms. Jones went to pick up his uniform and then left. Jones received a name tag as part of his uniform. The Paragon handbook Jones received states under the heading of "Uniforms and Appearance" that "You will be issued either 'wash-and-wear' or 'dry clean-only' uniforms, at no cost to you." It later states, "If you are issued a uniform that requires dry cleaning, the local contract office will make arrangements to either provide clean uniforms to you, or reimburse you for dry cleaning expenses."

On October 26, Jones attended a mandatory quarterly USDA training meeting conducted by USDA employees. The whole force of SPOs attended which included SPOs to be hired by Paragon and AEPS. Jones testified security officers working in the Carver Center building in Beltsville also attended the meeting, although they are not part of the bargaining unit. Jones testified that, after the quarterly meeting was over, George Devers, a representative of AEPS spoke.[9] Devers stated AEPS was the prime contractor and Paragon the subprime. Jones did not

[9] Respondents in their answer state Devers' title is director of security operations for AEPS, and they admit that he is a statutory supervisor and agent of Respondents.

remember Devers taking questions. Jones testified he did not ask Devers any questions because AEPS did not concern him.

Jones testified it was after AEPS and Paragon assumed operational control that he learned that he was no longer receiving an hourly uniform allowance. Jones testified he learned that, "When we got our first paycheck." Jones testified that, at that point, no one from the company had told him that he would not be receiving a uniform allowance. Jones testified that AEPS had sent shoes to the site so Jones thought this would take the place of the prior shoe allowance. However, he testified that Paragon never sent shoes. Jones testified that prior to October 28 he was never told by a representative of Respondents that the shoe allowance would be discontinued but he was told this at a later date. Jones testified that for the October 26, 2013, training he received training pay at $8.25. Jones testified that when he received training while employed by USEC they received their regular hourly rate. Jones testified the typical length of their shift was 8 hours when he worked for USEC. Jones testified for that company when he was scheduled for 8 hours he was paid for 8 hours. Jones testified that when he worked for Paragon, prior to the parties agreeing to a new collective-bargaining agreement, when he worked 8 hours he was paid for 7 ½ hours. He testified the change was he was receiving an unpaid 30 minute lunch break, while he was paid for his lunch break by the prior employer. Jones testified that his lunch break first changed to being unpaid a couple of weeks after Paragon and AEPS took over the contract. Jones testified his breaks were not changed the first day of his employment. Jones testified for the first couple of weeks, he believed he was receiving a paid lunch break. Jones testified in his capacity of union officer he was only aware of one predecessor employee who was not hired by Respondents and that was because the employee failed a drug test.

Jones attended a guard mount meeting at the beginning of every one of his shifts. He testified that in, August and September 2013, Lt. Hayes was giving the guard mounts Jones attended. Jones testified he works 5 days a week and he did so in August and September. Jones testified he never heard a guard mount supervisor talk about the substance of a document which Ortman later identified as a document he had generated concerning the transition and which Ortman testified had been discussed regularly at guard mounts. Jones testified he was never told he was going to receive a 30 minute unpaid lunch break when the contract turned over to AEPS or Paragon during the pre-transition guard mounts. Jones testified during the last 90 days while he was working for USEC, he was working the 11 to 7 shift. Jones tested then Major Peter Covington and Ortman never conducted guard mounts Jones attended.[10]

Timisha Fitzgerald Walker (Walker) testified her name has also been Timisha Fitzgerald, and currently Fitzgerald is her middle name. Walker is an SPO employed by AEPS in the South Building. Walker became a security officer at USDA in 2000, and has worked there continuously since. Walker has been a union steward since 2006. She has never been a chief steward. Walker testified all of her coworkers with USEC and Securiguard became employees with Respondents, except one. Walker testified as follows: In mid-September 2013 Walker saw a posting on the officers' bulletin board that Paragon and AEPS would be taking over the USDA contract. The memo contained no company logos, and it stated the security officers needed to see Ortman in reference to the new contracts to find out which company the employees were assigned to. Walker spoke to Covington prior to speaking to Ortman. Covington told Walker to speak with Ortman in reference to her company assignment, and the officers would probably have to provide their email address so they could be sent to a link as Covington believed everything would be done online. Covington told Walker it was more likely she would be working

[10] Respondents admit in their answer that Covington is a captain at Paragon, and he is a statutory supervisor and agent of Respondents.

for AEPS since she was currently assigned to the South Building. Around 2 days later, Ortman called Walker and stated she needed to give the company her email address so they could send her the link to apply for employment with AEPS. Ortman told Walker she needed to make sure she had her dates of certification to complete the process. Walker gave her email address to her supervisor that evening. The bargaining unit is only security officers and excludes, sergeants, lieutenants, captains, and majors. Walker testified Ortman was the liaison for AEPS during the contract transition process.

Walker testified she received an email from AEPS on September 23. Walker testified the email "was generally a basic e-mail offering employment and to go to the link." The email provided an on line link for employees to begin the application process. Walker testified other than the link there was no substantive writing in the email. Walker explained her reference to the email as an offer of employment stating it said, "if you wanted to apply for employment with AEPS, that we needed to go to the link and follow the link." When Walker clicked on the email link it took her directly to the AEPS application process. Walker testified that: The link eventually took her to different policies she needed to sign off on. Walker submitted a resume at the time she submitted her application. The first email AEPS sent Walker was the link to AEPS application site. Walker completed her online application on September 25. While she was filling out the application she also completed her federal and state tax forms and the I-9 form. While completing the application, Walker also reviewed: a nondisclosure agreement; a sleeping-on-the-job policy; and a zero tolerance acknowledgment. Walker filled out or reviewed all this information while completing her application on line. She testified this was all part of the application process. Walker testified she had to complete her certification dates for her CPR/first aid, AED, and things of that nature. She testified she also provided direct deposit information while filling out her application including her bank routing and account number. Walker testified that while completing the on line application AEPS did not tell her there would be any change in her working conditions once they took over the contract. However, the application states her employment was "at will" and she could "be terminated at any time without any previous notice and without any requirement of cause."

Walker received confirmation by email on September 25 from AEPS that they received her application. While she found emails from AEPS dated September 25 and October 17, she could not find the email she received on September 23 containing the link to the application website. Walker testified she usually saves job related emails, but she no longer had the email with the application site link because she had received confirmation that she was going to be employed from AEPS via the September 25 email. Walker testified a couple of days after completing her application she gave her driver's license and social security card to Lamont Isaac, the administrative representative for AEPS at the USDA site.

Walker testified there was a government shutdown in 2013. Walker testified her next contact from AEPS was an October 17 email. The email addressed to Timisha Fitzgerald stated it is from Ortman and Walker was being extended a contingent offer of employment to work for AEPS as an SPO effective October 28. The email stated the offer was contingent on Walker's satisfaction of all federal and state government required licensure, training and suitability qualifications, including medical and firearms testing and a pre-employment drug screen. The offer included Walker's hourly wage and fringe benefit rate, and stated the fringe benefit will be directed towards a company sponsored medical plan, or under certain circumstances, towards a company-sponsored 401(k) account, pre-tax. It mentions other benefits in terms of holidays, and vacation. The email states, "Shift schedules will be determined in accordance with the operational needs of the contract, with consideration given to employee seniority. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and

Federal law requirements and subject to the operation needs of the contract." The email states, "Training will be paid at a rate of $8.25 an hour." The email states Walker's employment is at will, which included the employer's right to terminate Walker without notice or cause. The email stated that pursuant to Executive Order 13495, Walker was being given a first right of refusal for this job opening. The email stated, "If you intend to accept employment with AEPS, please print this letter, sign it, and give the signed letter to Ortman, the project manager by October 28.

Walker testified when she received the October 17 email she went to speak with Ortman in his office. No one else was present. Walker testified that: She told Ortman she had received an offer letter from AEPS but she had some concerns regarding the letter in reference to health and welfare issues and the rate for training pay. Walker testified Ortman, "stated that as far as the health and welfare is concerned, that he was on the phone speaking with the company currently in reference to this matter." Walker testified she told Ortman, "if they're going to take our health and welfare, that I'm not going to be signing this letter." Walker testified Ortman said, "this is basically a general letter that we received for employment and not to worry about it. And that as long as we, you know, as we do our part, he'll do his part in reference to that." Walker testified Ortman's statement that "we do our part" was in reference to "we the Union." Walker testified Ortman said, "he'll do his part. He'll be talking to the company in reference to it." Walker testified upon Ortman's "reassurance that this was basically a general offer letter and that he also stated that he didn't think so, as far as them taking our health and welfare and things of that nature, I signed the letter." Walker testified that, after talking to Ortman, she signed the offer letter accepting employment on October 18 the same day of the conversation and submitted it to Ortman. Walker testified there were no job fairs by AEPS, and she was never interviewed by AEPS before receiving the October 17 offer letter.

Walker testified in terms of taking their health and welfare that meant the employees would not be receiving their health and welfare as a cash benefit as they had with the predecessor employer, but they would receive it in some other form. Walker testified that with the prior companies when she took the cash she paid for her own health and welfare and she used portions of the money to put in her own savings account. Walker testified now they are taking the health and welfare and a chunk of that money is going towards the employee's health insurance and it is much more expensive than what she was paying for on her own. Walker testified it was less expensive for her to take the money and buy her own insurance.

Walker testified that after submitting the signed letter of acceptance she was required to give her uniform size, which she provided the following week. Walker testified she received the uniforms the next week and it was prior to AEPS taking over the contract. Walker testified she picked up her uniform in the security office where all the uniforms were in bags with the officer's name on them. She also picked up her name tag, and there were shoes there for them to pick out their shoe sizes. Walker testified that when she picked up her uniforms nothing was discussed about the uniform allowance, the shoe allowance, or other working conditions. The uniforms were the same as the prior uniforms except the color of the shirt changed. Walker testified that prior to AEPS taking over she supplied her own shoes.

Walker testified that, after picking up the uniforms, there was a memo posted stating there would be a mandatory USDA quarterly meeting, and an orientation on Saturday, October 26. Walker testified George Devers, Ortman, and Covington attended the October 26 meeting.[11] Walker testified that after the quarterly meeting they had orientation which lasted about 30 to 45

[11] Respondents admit in their answer to the complaint that Devers has the title of director of security operations for AEPS and he is a statutory supervisor and agent for Respondents.

minutes. Ortman and Devers spoke at the orientation. Walker testified that: Devers stated AEPS and Paragon would be taking over the contract. Devers did not discuss working conditions or say anything about: break, uniform allowance, or shoe allowance. Devers spoke for around 10 minutes and then opened the floor to questions. SPO Sherrie Gaines raised some questions concerning the 401(k) plan. Then another officer asked if they would be taking the employees' health and welfare. Devers stated health and welfare would go towards a company sponsored health insurance plan. Then the question was asked what if they have their own health insurance, and Devers said then the money would be rolled over to a 401(k) plan. There was also a question as to whether they would be paid $8.25 an hour for training pay and Devers said yes. In response to a question, Devers stated they would be receiving $8.25 an hour for the meeting they were attending. Their prior employers had paid their training at their hourly base rate at $26.76. Walker testified the issues in the offer letter were issues they discussed during the October 26 meeting. Another issue discussed was whether 32 hours would still be considered full-time employee status. Walker testified the question was asked because officers' hours were being cut and they wanted to know if 32 hours would still be considered full-time status. She testified Devers said he was not aware of any hours being cut, but 32 hours is still considered full-time status. Walker testified officers asked why there was a difference between the Paragon pay and AEPS pay in reference to how frequently they will be getting paid. Walker testified Paragon employees were currently being paid bi-weekly and AEPS employees would be getting paid twice a month. Devers stated it will remain that way because that is how AEPS distributed their payroll. Walker testified breaks, shoe and uniform allowance were not discussed.

Walker began day working for AEPS on October 28. Walker testified that under the predecessor employers she did not receive any unpaid breaks. Walker testified that when she started working for AEPS her breaks remained the same, but they eventually changed. Walker testified that her breaks changed around the end of November or beginning of December 2013. Walker testified that her breaks or her daily hours were reduced by half an hour. Walker testified that, when she asked Ortman about it, she was told it was because they were deducting a half an hour for the lunch break. Walker was aware other employees' breaks changed immediately under AEPS in her capacity as steward. Walker testified that they had issues concerning the 30 minutes that was being deducted from their checks. Walker identified some of her AEPS pay stubs. As per the pay stubs, on October 29, Walker worked 7 a.m. to 6:15 p.m., and she testified she was compensated 11.25 hours for that shift. Walker testified she received a paid lunch break that day as she was compensated for all hours worked for her entire tour. Walker testified her pay records for November 29, 2013 show she worked a shift of 8 a.m. to 3 p.m. Walker testified she received a paid lunch break that day because she was paid for all hours on her tour which was 7 hours. Walker testified that after the breaks changed to unpaid she continued to work the 7:00 a.m. to 6:15 p.m. shift but was only compensated for 10.75 hours for that shift.

Walker testified the uniform allowance was a line item in her pay stub when she worked for the predecessor employer. Walker testified that when she received her first paycheck for AEPS it did not have a line item for uniform allowance. Walker testified that in her capacity as shop steward she was made aware that AEPS did not offer a shoe allowance. Walker testified she first learned there would be no shoe allowance in the beginning of 2014. She testified there were officers that had gone to Isaac stating the shoes they had been issued through AEPS were uncomfortable and they were going to purchase new boots. Walker testified that when they gave Isaac their receipts he submitted them but was told the company does not offer a shoe allowance. Walker testified the predecessor employers provided a shoe allowance as employees were reimbursed for the shoes they purchased. Walker testified the AEPS issued shoes are uncomfortable for her. Walker testified that only about 10% of the guard workforce wears the

company shoes, the remainder, including her, wear their own shoes. Walker testified she has not been disciplined for not wearing company issued shoes.

Walker testified that, after she received the email offer letter from AEPS on October 17, she was never sent any other online link by AEPS. Walker testified that the last time she completed any hiring related documentation for AEPS was the offer letter on October 18. Walker testified she never filled out any other documentation after the government shutdown related to policy acknowledgments. Walker testified concerning an AEPS computer printout with the name at the top stating Timisha Donnatta Fitzgerald Walker. Walker testified the printout appeared to be unusual because in 2013 she was not using her married name at work which was Timisha Donnatta Fitzgerald Walker. Walker testified she was only using Timisha Donnatta Fitzgerald at the time. Walker noted the printout contained employee typed signature acknowledgments dated November 20, 2013. Walker testified she did not create any employment files in 2013 under the name to Timisha Walker. Walker testified she changed her name for work purposes to Timisha Walker in late April or early May 2014. Walker testified that in order to get her SPO, which is her armed commission for D.C., she had to provide them with her name change information. She had to supply a copy of her driver's license, and that was when she began the process of changing her name for work purposes. Walker testified she had to provide AEPS a change of personal information form and a copy of her marriage certificate. Walker was shown a similar AEPS computer printout where her name appeared as Timisha Donnatta Fitzgerald, which contained typed employee policy signature acknowledgments by her dated October 21, 2013. Walker testified she never went through the policies and acknowledged them a second time. Walker testified she submitted one application and, within this application process, she had to complete these acknowledgements at that time. Walker testified once she completed them she received her application has been submitted confirmation in September. Walker testified that no AEPS representative ever told her there was a problem with her policy acknowledgement. She testified she never completed the policy acknowledgments separate from her job application. The AEPS printout with the employee acknowledgement signature dated October 21, contains a W-4 tax form with the last name Fitzgerald. The same form with the employee acknowledgement dated November 20, was introduced and it contains a W-4 tax form with the last name Walker. Walker testified she never changed her tax information with AEPS.

Walker testified she was working 4 days a week in August through October 2013. She testified she had four guard mounts a week during that time. She testified some of the subjects were covered at guard mounts prior to Respondents assuming the contract pertaining to a typewritten document she was shown at the hearing which had been identified by other witnesses as a memo generated by Ortman. However, she testified that concerning health and welfare they did not say at the guard mounts that the health and welfare would go to insurance. Walker testified what was said was that they needed proof of insurance. Walker testified after AEPS came in they were told if they did not have health insurance they were going to be required to take health insurance through AEPS. Walker testified she did not hear this said during pre-take over guard mounts. Walker testified in the guard mounts before AEPS took over they just said if you have health insurance you are going to need to provide proof of health insurance. She testified they were not told that they were going to be required to take health insurance with AEPS at that time. Walker testified it was discussed at pre-October 28 guard mounts that they would be moving from white to blue shirts and they needed to make sure that they completed a drug screen. They also talked about getting new radios. They were told to make sure they provided their social security cards and driver's license. Walker testified that prior to the changeover there were no guard mounts in which the employees were told they would be receiving a 30 minute unpaid lunch break. She testified if they were told that then it would have been an issue raised at the October 26 meeting, but it was not discussed at the meeting. She

testified it was also not stated immediately after the changeover. Walker testified Ortman never participated in her guard mounts. She testified his time of arrival was not that early. Walker testified her guard mount was at 7 a.m., and sometimes she attended the 6:45 a.m. guard mount.

Sherrie Gaines works as an SPO for AEPS, and was previously employed by Securiguard. Gaines has served as vice-president of the Union since 2007. Concerning applying for employment with AEPS, Gaines testified around the middle or end of September the supervisors asked the officers for an email address to enable AEPS to email a web link so they could get into the AEPS system. Gaines received an email from AEPS with the link to file an application. Gaines testified there was no substance in the email, except for the link. Gaines used the link to apply for employment. When she followed the link it enabled Gaines to complete "All the stuff that you would fill out for employment. We had banking information was in there, W-4s was in there, harassments, that kind of -- everything that you would fill out." Gaines testified there were policies and a handbook policy there. Gaines testified you had to acknowledge the policies on line by checking off on them. Gaines testified everything was done online. Gaines thought she filled out the online application in early October. Gaines completed the application within a couple of days after she received the email link. Gaines testified that, after she completed the application, she never used the link again to go back on line and complete any other information. Gaines was shown a questionnaire which she testified was part of her application to AEPS. She testified that she completed the information on the document. The date on the application is September 26, and Gaines testified she had no reason to doubt that date. Gaines was shown another document which contained the heading "acknowledgment signatures". She recalled going through a series of pages and having to read different documents and acknowledge them by clicking an acknowledgement. When Gaines was asked if she had any reason to doubt that she did this on October 19, which was reflected on the document, Gaines asked why it was a different date from the other document which showed September 26. Gaines testified she thought she filled out both documents together as part of one packet. Gaines' recollection was she completed the policy acknowledgment signatures at the same time she completed the job application.

Gaines testified she received a job offer from AEPS by email, which she signed on October 17. Gaines testified that, after receiving the job offer, she did not go back on line and complete additional information for AEPS. Gaines testified she had already completed the information on line when she received the offer letter. She testified the offer letter had Ortman's name on it so she phoned Ortman the day she received the letter. Gaines testified her talking to Ortman was the only reason she signed the letter. Gaines was at home at the time of the conversation and Ortman was in his office. Gaines told Ortman she was calling about the offer letter and she said it states they were going to get $8 and some change in training pay and they were going to take their health and welfare. Gaines asked Ortman what was going on. Gaines testified, "He said don't worry about it, it's a general letter, go ahead and sign it, everything will be okay." Gaines testified that after she spoke to Ortman she signed the offer letter, took it to work and gave it to Ortman.

Gaines testified that in the month leading up to AEPS taking over she worked 3 days a week. Gaines testified she attended a guard mount at the start of every shift. She testified that at the time Cpt. Brooks did the guard mount. At the hearing, Gaines was shown a copy of type written document which Respondents claim was used as a guard mount talking point. Gaines testified she had not seen this document prior to the hearing. She testified the items in the document were not covered at the guard mounts she attended. Gaines testified she was never

told at a guard mount that she would be receiving a 30 minute unpaid lunch break. Gaines testified she would have recalled hearing this because it would have altered her pay.

Gaines testified she attended the October 26 quarterly meeting at the USDA. Gaines testified that after the meeting there was an orientation. She testified Devers was present for and took questions during the orientation. Gaines testified that during the meeting employees asked about health and welfare. She testified they did not ask about a training rate. Gaines testified no one asked questions about breaks. Gaines testified that no representative of management told her prior to that orientation that her breaks would be changing.

B. Respondent's Witnesses

Devers works for AEPS as director of operations. He is based in Austin, Texas. Devers testified that: AEPS is a government and commercial contractor and 80% of its work is done with the federal government. The scope of AEPS operations is from east to west coast, and AEPS has about 26 federal contracts. Devers was involved in the process of AEPS acquiring the contract at the USDA buildings. Devers received a copy of the USEC collective-bargaining agreement (CBA) as the USDA contract had the CBA attached. AEPS used the USEC CBA to comply with the Service Contract Act (SCA), in lieu of a wage determination. Devers testified he gave no consideration to adopting the USEC CBA stating AEPS is not required to, and he prefers to negotiate his own CBA.

Devers testified AEPS' obligation with regard to the incumbent officers under the SCA was to follow all the financial and fringe benefits of the prior CBA. Devers testified the hourly rate for the guards would not change. The health and welfare benefit amount cannot change under the SCA, and they would still receive the same number of holidays and same vacation. Devers testified under the Executive Order when AEPS takes over a federal contract the incumbent employees have the right of first refusal concerning employment. Devers testified that, "We offer them employment under the terms and conditions, and it's up to them if they want to accept it or not." Devers testified there is no requirement under the SCA as to whether the employer pays on a weekly, bi-weekly, or bi-monthly basis. As to fringe benefits, he testified there is an amount that has to be paid, and the employer has the right to decide how to pay it. Devers testified under the SCA there is nothing the employer is restricted from doing in connection with work schedules which are based on operational need or contract necessity. There is nothing in the SCA restricting the employer in setting break schedules.

Devers testified when AEPS is going to take over a site it does not know if the incumbent employees will accept AEPS' offer of employment. He testified the incumbent employees might also not successfully complete the requirements for AEPS's contract which may be different than the predecessor contract. Devers testified the qualifications the guards need to meet for the USDA contract include: a seven panel drug test; a physical; a physical agility test administered by the government; and two weapons clauses. However, Devers testified the employees of the predecessor are required to maintain qualifications for employment with the predecessor employer. Devers later testified he did not believe there was a requirement change for AEPS in this instance in that other than drug testing there was no change for this contract in terms of the employees' requirements.

Devers testified that: Devers was in contact with the predecessor project manager Ortman as early as August 9. Devers approached Ortman toward the end of August about becoming project manager for AEPS and he advised Ortman that Ortman would be AEPS transition steward. When Ortman was first employed by AEPS, Ortman was still working for

USEC as their project manager. Ortman became salaried for AEPS at the AEPS contract startup. Devers testified Ortman was working hourly for AEPS prior to then beginning toward the end of August, early September. Devers testified Ortman had the title project manager for AEPS as of August 2013.

Devers testified that: During the transition period, Devers provided Ortman with various instructions for employees, and depended on him to convey AEPS's position to the employees. Devers told Ortman initially Devers was not sure of all of the parameters of the USEC working conditions. However, Devers knew from prior transitions they would only be honoring the fringe and financial portion of the predecessors' CBA. He testified the guards hourly rates would be the same, health and welfare would be directed either to a companywide health insurance or a 401(k) in that if someone had insurance and showed proof of it goes to the 401(k). If they do not have proof of health insurance it goes to the health plan and the remainder goes to 401(k). Devers told Ortman everyone's holidays and vacations would be maintained as the status quo. Devers told Ortman whatever questions he received to contact Devers and they would compile a list of answers and answer everyone's question at one time. Devers testified it would have been at the end of August time frame, 60 days prior to the contract, when Devers told Ortman they would not be following all of the prior CBA. Devers testified that, during the transition period, Ortman sent him incumbent rosters. Ortman was also charged with making sure employees' sizing documents were submitted. Devers testified that a minimum of a week or two before AEPS's start date they had to order employee name tags at AEPS expense. Devers testified they had to have them when the employee's picked up the uniforms.

Devers testified Ortman phoned him with several questions from employees Ortman had received. Devers provided him answers to the questions. Devers testified that as to shoe allowance they were providing shoes so there would not be a shoe allowance. Devers testified in their work statement there was a particular shoe USDA dictated all the officers needed to wear. Devers testified he discussed these points with Ortman and these discussions took place by phone about 60 days prior to the start of the AEPS contract. Devers testified he told Ortman to answer all the officer's questions and to let the supervisors know so they could let everyone know the answers at guard mounts.

Devers testified for the AEPS's application process for USDA they had just switched to an online system employing an IT provider called Kwantek, which they currently use for all jobs. Devers testified information was relayed to Ortman to have the officers go on the AEPS' website under employment. They could search by job which would be USDA DC HQ. Devers testified whenever AEPS is starting a new job site there is a clickable link on the AEPS site which takes the person to the initial application phase. At that point, they enter their personal information including name, address, phone number, personal email address and they complete the application portion of the process. Devers testified they had not used this online process before the USDA contract. Devers testified it was done in stages since they were just starting to use it. He testified AEPS would supply the documents which Kwantek would load in the system. Devers testified for the application portion of the process no email with a link was sent to people in advance asking them to apply because AEPS would not have their email address and it would not be in the system. He testified the application phase allowed them to enter their email addresses in the system. Devers testified he never asked Ortman to collect peoples' email addresses.

Devers testified when someone wanted to apply: The first step would be for them to go online at the AEPS website and fill out the application. Devers explained an applicant for a USDA job, during this time frame, would go to the AEPS website, then go to careers and

opportunities and there is a search block where the applicant can search all the jobs available in DC coming up and they click on the one they want to apply for. Devers testified the employees would know to go to the website because the information was given to them through Ortman for incumbents or anyone outside because they had inquiries from people outside who were interested. Devers did not know whether the information was given to the guards as to the website by Ortman verbally or in written form. He did not give Ortman any instructions on how to distribute the information; stating Ortman was just to make sure people had access to the company website to start the application process. Devers testified his instruction to Ortman was to, "Just pass along our website and how to apply."

Devers testified the application process began around mid-September. Devers testified the Kwantek based software issued a report listing the dates when each person completed the AEPS application. He testified the report shows the first application was completed on September 18. Devers testified the report showed Timisha Fitzgerald (Walker) completed the application on September 25. Devers testified when someone was filling out the application they were not able to fill out W-2 and W-4 forms, policy acknowledgements and things of that nature. He explained it is a three-step application process. Devers testified the next step in the process after the applications were received was delayed due to a government shutdown, which he believed took place from October 1 through 16. He testified offer letters are the next step after the applications. Devers testified the template for the offer letters is loaded into the Kwantek system and it generates an offer letter with a person's name, address, and then emails it directly to their personal email. Devers, upon review of Fitzgerald's offer letter and its date, testified all applicants contained on the applicant list received an offer letter on October 17. Devers testified it is a contingent offer letter and the first line it says, "On behalf of AEPS, I am pleased to extend you a contingent offer of employment." Devers testified it is a contingent offer letter because, the applicant has not met all of the contract requirements such as passing the drug screen, or firearms test. Devers testified, under the executive order, AEPS cannot fill any employment positions until it has offered all of the predecessor's employees employment.

Devers testified the process of signing off acknowledging the receipt of employer policies, viewing the handbook, W-4 forms completion, things like that could not have been done before the offer letter was sent out because AEPS had to supply Kwantek with these onboarding documents to upload in the system, and that was not done until October 16 or 17. Devers identified what he testified was an internal email dated October 8 stating that new onboarding with Kwantek will be up by the end of the week. It stated the first new employee for USDA to use the system will be the project manager, and then the other new employees will be starting next week. Devers testified that Kwantek ran into some problems and it was delayed. He testified Tara Devers, who sent the October 8 email, is Devers' wife, but she is also the contract's administrator for AEPS. Devers testified that no one could have accessed and filled out information on the system for the onboarding portion prior to October 8. Devers estimated the onboarding would have been available to Ortman around October 12 or 14, and it would have been available to the field around October 16 or 17.

Devers testified when someone starts using the onboarding process Kwantek sends an automated response to AEPS. The response is sent to the person who is listed as the manager and who is in charge of the manager called the admin. Devers testified for this job Ortman was the manager and Devers was the admin. Devers testified the onboarding stage is the third step to the application process. He testified it is done in three parts, application, offer letter, and then onboarding. Devers testified Respondent's Kwantek records reveal Fitzgerald (Walker) completed the onboarding process on October 21. He testified the onboarding process is that after you complete all the paperwork, you sign stating you have received notification of the

handbook; a drug/background check; sexual harassment, zero tolerance policies; your state and federal tax forms; and everything in your normal hire packet. Devers testified some of these Fitzgerald (Walker) would be acknowledging receipt and some she would be filling out online. He identified a computerized employment document stating the information was filled out by Fitzgerald (Walker), as per the document, on October 21, when she signed off on all AEPS policy acknowledgments, including ethical value statement, zero tolerance, post-employment safety, substance abuse, authorization for deductions, and non-disclosure agreement. Devers testified all of these documents were required to be signed before beginning employment with AEPS. However, Devers testified that inadvertently the manager was listed as the wrong person on the document so the document had to be re-executed by some of the employees and the manager who viewed the document. When the documents had to be redone the employee would have to click on the e-signature each time, and it would show a different date and time.

Devers testified once the documents are signed an employee would have no reason to go back and redo the documents unless the document was misfiled, or there was a name change, or something of that nature. Devers testified it would only make sense for employees to fill out these documents prior to being employed. However, Devers testified that in the Kwantek system once someone entered the system, i.e., to change their state tax form it would show a new date for acknowledging AEPS policies, although it did not mean that the employee re-acknowledged the policies at that time. He identified a document pertaining to Fitzgerald (Walker) stating the document shows there was a change to the profile on October 21. Devers testified on the computer printout containing the October 21, acknowledgments, on the second page the manager's signature is blank, and the administrator is signed off as Tara Devers. Devers testified the manager's signature should have been Ortman's, and the administrator should have been himself. Devers testified this creates a problem for the approval process of being sure that everything was completed correctly. Devers testified the manager's signature is the most important as it relates to the I-9 form. Devers testified AEPS will be fined for having that information wrong because the I-9 is not complete and not proper. Devers testified the I-9 was not properly done because there is no manager's signature listed inside the block, and Tara Devers is listed as the administrator when she should not have been. Devers testified the I-9 was completed on the date shown on Walker's next record as the signature date.

Devers identified a computer document from the Kwantek system concerning employee Cynthia Bryant's new hire paperwork. Devers testified it appears she signed on October 21 and then, for whatever reason, the system listed Tara Devers as the manager and the admin. He testified that on 10/27/2013, it says Tara, pending manager approval. And then on 11/12/2013, it says Tara, pending admin review. Devers testified this is a problem because there needs to be two different manager approvals in the process for it to be legitimate, for the system to work properly. Devers testified the problem was solved, it appears to be that Bryant re-signed the new hire paperwork and onboarding documents on January 26, 2014. Ortman is listed as the manager on January 27, and Devers is the admin on February 12, 2014.

Ortman works for AEPS as project manager. He had previously been the project manager for USEC/Securiguard. Ortman testified he was offered a position by Devers to work for AEPS, and was interacting with Devers as early as August. There was a period prior to October 28 when AEPS was paying Ortman to act as project manager. Ortman estimated this began around the end of September early October. Ortman met Devers and AEPS Owner Walker when they came down for the USDA award presentation. Around a week later, Ortman and Devers began to discuss the transition to AEPS. Ortman testified, at that time, the discussion included Ortman explaining to Devers how the current contract operated, and Devers explained what AEPS was going to do different. Ortman testified they discussed some of the

initial terms of employment AEPS would set. They talked about the Paragon and AEPS split and how it would affect the employees who would work for Paragon. It was discussed that AEPS would maintain the South Building and Paragon would have the Whitten Building. Ortman testified they talked about how breaks would work and how they would change. Ortman testified he had many conversations with Devers.

Ortman testified that, while working for USEC, he communicated with SPOs at the guard mount daily briefings. Guard mount presentations to officers are given by Ortman, or one of the supervisors. Ortman testified they received a lot of questions from the officers relating to pay and health and welfare and as to what would be changing with the new contractor. The officers wanted to know how it would be determined who worked for which company, what the minimum hours for work would be for full-time benefits, would the hours change, would the schedule change, and would post assignments change. Ortman wrote down the questions to go over some of them with Devers. Ortman identified a document in his handwriting, entitled "Questions for George." Ortman testified he wrote the six itemed document in mid to late August. The second item reads, "2. Pay, sick leave, 401(k), insurance, breaks, ???" Ortman testified after he generated the document he talked to Devers. Ortman testified he made notations concerning his discussion with Devers, and he identified another document in his handwriting based on those discussions. The second item on Ortman's cryptic response sheet relates to pay, H & W, 401(k). Ortman testified Devers stated the pay will stay the same, health and welfare would go to an insurance benefit or 401(k) plan. It was stated in this sheet in response to Ortman's list of employee generated questions the company was setting up an application online which would be available soon. Ortman testified that his notes continue beyond the six items raised in his initial question sheet in that on the second page his notes show he discussed shoes, schedules and tasks with Devers. Ortman testified that at the time it was stated that AEPS was going to provide shoes as part of the uniform. Ortman did not recall if he asked about a shoe allowance for the officers. Ortman testified his notes concerning his discussions with Devers mention union issues, training pay, and health and welfare. Ortman testified they talked about the reduced pay for training and they talked more about health and welfare. He did not recall what the reference to union issues meant.

Ortman testified he used the notes he had generated from his discussions with Devers to put a together a 10 bullet typewritten statement. Ortman testified he discussed with Devers that Ortman would put the information out at guard mounts. Ortman estimated he prepared the document at the end of August or about 60 days prior to the October 28 startup because of the language contained in the document supported that time table for its dissemination. Ortman had no independent recollection of when the document was created. Ortman testified the document was generated before the application process began because the document states the application process will be determined soon. The document reads:

> Sups, pass along the following at each GM. With the contract change we have a lot to do in the next 60 days. I know we already heard grumblings about pay status and schedules. Here is what I know so far.
>
> - Pay will stay the same.
> - H & W will go to insurance or 401k (Officer has to provide proof of insurance for 401k).
> - Some schedules will change due to roster split and Company post assignments I will do my best to make it as minor as possible.
> - Lunch breaks will be reduced to 30 minutes unpaid with a 10 minute paid morning break. Restroom breaks will remain the same.

- Uniforms-Officers have blue shirts Supervisors will have white; shoes will be provided by the company. Lt. Straughter will be getting with the officers for uniform sizes. We will still be wearing the straw "Trooper" hat. Each Officer and Supervisor has to complete a physical and drug screen due by date TBD.
- We will be getting new radios.
- Application process will be determined soon.
- Paperwork, birth certificates, SS card, HS diploma/GED, you going to need to get this information ready to be turned in for you processing.
- PT test has been pushed back until the next refresher training.

Ortman testified the document was placed on a clipboard the supervisors use when they do a guard mount and they read it directly off the clipboard to the officers. Ortman testified there were around eight supervisors, and all eight use the same clipboard. Ortman could not recall if he put the memo on the clipboard or if he gave it to Covington to place there. Ortman testified he did some of the guard mounts when he read the document. Ortman testified that guard mounts using this document were done for at least a month. He testified there were three or four main guard mounts a day. When asked if the document was read four times a day for a month, Ortman responded, "It's read at each guard mount, correct. The same officers don't attend the same guard mounts, yes." Ortman testified that guards are required to attend a guard mount prior to their shift so every time they are scheduled there is a guard mount. He testified the guards would have heard the memo read to them at least once a day for the days they worked during this 30 day period. Ortman testified he had a discussion with the supervisors before giving them the document to place on the clipboard. He told them about the conversation he had with Devers and some of the changes that were going to be taking place, how to get the information out, and how to take questions from the officers. Ortman testified the employees worked 5 days a week, some less some more and that on average the document would have been read to them 20 times during a month period if Ortman's instructions were followed. Ortman testified it was not sufficient to read the information two or three times over the course of two or three days because, "We wanted to keep putting the information out so everybody had it." Ortman testified the document was read at the guard mounts starting at the end of August. Ortman later confirmed that his typewritten memo was read for 30 consecutive days at guard mounts, and employees who worked 5 days a week would have heard the speech 20 times. Ortman testified as follows:

JUDGE FINE: So these guards would have heard this read to them at least once for 30 days?
THE WITNESS: Correct.
JUDGE FINE: At least once a day for 30 days that they worked.
THE WITNESS: Correct.

Ortman testified the guard mounts take place in the security office outside Ortman's office door. He testified he heard or attended guard mounts where the transition memo was discussed. Ortman testified officers Jones, Gaines, Mozon, Swann, and Coffer complained about the announcement, and that the majority of the staff complained at the guard mounts. He testified Jones and Mozon complained about health and welfare, non-paid breaks, the lunch breaks, the reduced 15 minutes to a 10-minute break. Ortman testified Jones complained about the 45 minute lunch break to the 30 minute unpaid lunch break. He testified officers Coffer, Robin, Tilghman, Petway, Proctor, Timisha Fitzgerald and Swann complained about the same things. Ortman testified these conversations were prior to the offer letters.

Ortman did not recall the exact date the application process began. Ortman testified he

spoke with Devers on the phone and determined the best way to do the application process was to set up a workshop for the officers before and after duty, on their days off, and during their breaks. He testified they set up workstations in the security office, but they did not have to do the applications in the security office. They could have done them at home on the computer. Ortman testified they communicated to officers about doing the application by posting it on the board and verbally at guard mounts. Ortman testified he did not retain copies of what they posted as USDA changed the computers and Ortman lost all his information when they put the new computer in.

Ortman testified officers completed applications and the next step after the applications was the offer letter. Ortman testified he did not prepare the offer letters but he printed them out and had each officer sign them. Ortman testified he signed the letters. Ortman testified the officers also had to complete I-9's and he had staff assisting him for everyone to complete the paperwork. He testified it involved each person coming down and doing the workshop. Ortman testified the additional paperwork was completed in the security office and on line. He testified they were two computer stations at the security office where the officers were required to complete the paperwork. He testified they could not complete the second part anywhere else, and they could not complete the I-9 process at home.

Ortman denied having any phone conversations with Walker about her offer letter. As to the offer letters, Ortman testified the officers came in, read them, and then signed to accept or not accept. Ortman testified he asked the officers if there were any questions and there were no questions as to the offer letters. Ortman testified he met Walker with her offer letter in his office. Ortman testified he met with every AEPS officer about 65 individually about the offer letter and none of them had a question about the letter. Ortman testified that, when he met with Walker, she did not say anything along the lines of she really did not want to sign this the way it is and she did not agree with the things in there. Ortman testified there was a place she could have declined and she did not say anything. He testified she accepted the offer. Ortman denied saying anything suggesting Walker could ignore what was in the letter. Ortman testified it was the officer's option as to whether to accept or decline the position and, "I didn't encourage her to do it or not to do it." He denied telling Walker not to worry he was going to work this out with AEPS and she was not going to have to do any of the things in the letter. Ortman testified he did not have the authority to do that.

Ortman testified he never had a conversation with Jones over the terms and conditions of employment offered by AEPS. Ortman testified he did not remember any phone conversations with Jones about his offer letter. He denied having a conversation with Jones in which Jones said something like he was not sure whether he should sign the offer letter and he was not happy with the things in it. Ortman denied telling Jones that he did not have to worry about what was in the offer letter and Ortman would take care of it. Ortman testified he knew he did not have such a conversation because Jones works for Paragon and Ortman had nothing to do with his offer letter. Ortman testified his communication with Paragon concerning its job fairs and orientations was done through Rick Waddell, who ran the Paragon satellite office in D.C. Ortman testified Waddell would send information through an email and Ortman posted it. Ortman testified Waddell did not ask Ortman to make statements at guard mounts for Paragon.

Covington works for Paragon at USDA as a captain and a site supervisor. Prior to working for Paragon, Covington worked for USEC. Covington had the title of major with USEC and he was a site supervisor. He testified he went from the position of major to captain with Paragon as he was informed there was no need for a major with this contract. Covington testified that, as a major at USEC, he did quite a few guard mounts. Covington testified the day Ortman

found out Securiguard lost the contract, Ortman called Covington into his office and said AEPS/Paragon had obtained the contract. Covington estimated this conversation took place around June or July 2013. Covington testified since the contract was changing hands they did not know if they would be retained, and they had no idea what Paragon or AEPS would be offering at the time. Covington testified that, as time went on, Ortman told Covington site changes were coming. Covington estimated Ortman informed him there might be changes around a couple of weeks after Ortman initially told him that AEPS and Paragon were taking over the contract. Covington testified, around the middle of August, Ortman told him there was a possibility they were going to use Covington as a captain. In this regard, Covington testified Ortman told him there was a possibility Ortman would be project manager for the new contractor, and, if so, Ortman was going to request Covington be retained as captain.

Covington testified the site for Paragon is the Whitten Building which is the administrative building. Covington testified the Whitten Building is across the street from the South Building which is the AEPS site. Covington testified the security office and the supervisor's office is in the South Building which is where he starts his shift. He testified he will eventually go to the Whitten Building to check on the officers then he returns to the office in the South Building. Covington testified the Whitten Building has five posts with a total of 18 officers working for Paragon. On the morning shift, there are six officers on duty three on each side as there are two entry points. The afternoon shift eventually breaks down to just two officers, one on each side, and the night shift has one officer. Covington testified the South Building is much larger, and there are a lot more officers with at least 30 posts. Covington estimated there were 35 to 36 officers on the morning shift, 9 on the afternoon shift, and around 4 on evening shift in the South Building. Ortman is the project manager for both buildings, as well as for the Carver Center in Maryland. While one building is run by Paragon and one by AEPS all the officers eventually report up through the ranks to Ortman. Covington testified there are a tunnel as well as a walkway connecting the Whitten and the South Building and you can go from building to building without going outside. Covington testified the guard mounts for officers working in both the Whitten and South buildings are held in the South Building, and the guards from both buildings attend the same guard mounts.

Covington testified eventually Ortman told him that because Covington is an hourly person and receives health and welfare that Covington would not be getting it in his check. Ortman said you are going to have to select either insurance program or they are going to put it in a 401(k), but you will not be getting your health and welfare in your paycheck. Covington testified Ortman did not state he was fighting this to Covington. Ortman told Covington that it was a union issue and they were going to have to let the Union deal with it. When asked if there came a point in time when Ortman gave Covington more information about the ways in which AEPS planned to operate in terms of what they were going to provide to incumbents for wages, benefits, other conditions, Covington testified, "Besides the unpaid lunch breaks, no. I don't know any other benefits or any other thing we discussed as far as what's going to happen during the –" Covington testified he learned from Ortman as to unpaid lunches that the breaks would be reduced to 30 minutes unpaid. He testified the morning breaks would be paid maybe 10 minutes. Covington testified, "I said besides the unpaid lunch breaks and the health and welfare, no other things that we discussed about benefits." Covington testified this was later in August getting closer to the time that applications were supposed to start, and it was getting closer to the contract. Ortman stated that lunches were going to be reduced. Covington testified the officers were getting 45 minutes and 15 minutes in the morning and Ortman said that was going to be reduced. Ortman told Covington that he got the information from AEPS.

Covington also testified Ortman had a supervisor's meeting during which they were

instructed to get information out to the officers. Covington testified they knew from the meeting that some officers were going to be with AEPS and some with Paragon. He testified they were going to have to make selections on who would work for each company. Covington testified they were going to let them know the pay rate would stay the same, but they were not going to receive health and welfare. Covington testified Ortman told them to use the guard mounts to pass out this information. Covington testified once they selected, Ortman put names up to let the officers know which company they were working for and which side they would be on. Concerning communications at the guard mounts, Covington testified they use a clipboard which contains daily communications. Covington testified the supervisor who is doing the guard mount goes over everything on the clipboard. He testified certain information that Ortman wants distributed, Covington leaves on the clip board for 30 days. Covington decides on what stays on the clipboard, and when he feels everyone has the information he will take the memo off.

Covington identified Ortman's typewritten memo concerning the transition to AEPS as being given to him by Ortman to put on the clipboard for the supervisors to pass to the officers. Covington testified Ortman did not give any instructions as to how long it should stay on the clipboard. Covington did not tell anyone it needed to stay on for 30 days. Covington testified there is just one clipboard and it is used for each guard mount. He testified officers attending the guard amounts were people that work for USEC at the Whitten Building and the South Building. Covington did not recall the date he received the document from Ortman. He estimated it might have been the end of August or the beginning of September. Covington testified that he read the sentence, "With the contract change, we have a lot to do in the next 60 days", but he did not verify it with a calendar. Covington testified he did not know if the date was off. However, he did not have any reason to doubt it was put out 60 days in advance of the operational change. Covington testified he knew it was done before the application process began because Covington was part of the application process.

Covington testified that at the first guard mount he went over the transition memo by each bullet. He testified he did not do it every day like this. Covington testified he would not talk about the uniforms as everyone knew they were getting new colored shirts so there would not be a need to keep going over that. Covington testified in the beginning he would go through it point by point Monday through Friday and he did that for the first 2 weeks or so. Covington testified that after 2 weeks he asked if everyone was familiar with the health and welfare and the 30 minute unpaid lunch breaks and most of them said yes. He testified if they did not he would go into it in detail. Covington estimated it was on the clipboard 20 to 30 days, he did not know the precise amount, but he did not pull it until he felt comfortable. He testified he was the one to put it on and who took it off the clipboard. Covington testified he heard the memo discussed when lieutenants were giving the guard mount.

Covington testified he was present when Ortman talked to officers at guard mounts about what AEPS or Paragon planned to do in terms of operations. Covington testified that when Ortman was in his office he would hear some complaints and he would step outside and start participating in the guard mount. Covington testified Ortman said the same thing that Covington was saying that certain issues were out of their control. Ortman said it was a union issue and you guys are going to have to work that out. Covington testified that certain things such as if you have a uniform issue possibly we can work on that but certain things they did not control. Covington testified that Ortman identified the health and welfare, and the 30 minute unpaid lunch break as things that he could not do anything about. Covington testified Ortman never said in his presence not to worry about these things and he would take care of it later. He testified he never heard Ortman say that what they were seeing in the offer letters or other documents were things that they did not have to worry about.

Covington testified that he did not have anything to do with the AEPS application process. Covington testified that he did not do anything in terms of trying to get email addresses from the officers. Covington testified he never had any conversations with Walker in which he asked her for her email address so he could have it for the application process. Covington testified Paragon and AEPS employees are on separate payrolls under the name of each company and Covington handles the payroll for Paragon. Covington testified that Paragon officers were not receiving paid lunch breaks from day one of the transition. Covington testified he knew because he did the payroll for Paragon. He did not know whether AEPS employees received paid lunch breaks at the start up.

Yolanda Slaughter works for AEPS as a lieutenant. She previously worked for USEC at the same location as a lieutenant. Slaughter testified she was one of the supervisors who disseminated information at guard mounts. Slaughter testified Ortman informed her and the other supervisors AEPS had gotten the contract around the end of July. Ortman stated AEPS won the contract, they were going in with Paragon and some things were going to change. Slaughter testified when Ortman had the initial conversation he did not know all the ways things were going to change. Slaughter testified there was a point when Ortman met the supervisors and gave them more information about how AEPS planned to operate. Slaughter testified it was over a month before October 28. Slaughter testified Ortman gave instructions about how to communicate this to the officers stating it had to be at the morning and afternoon guard mount, which Slaughter she participated in. Slaughter testified there was a clipboard at the guard mounts which they keep the information on that came from Ortman that was passed to Covington. She read from the items on the clipboard during the guard mounts.

Slaughter identified Ortman's typewritten memo as one of the pass-ons for the guard mounts they received prior to AEPS coming aboard. Slaughter testified she used the document at the guard mounts over a two-week period and it stayed on the clipboard for over a month. Slaughter testified she starting out reading the document word for word. She testified, "After I done read it for over a week or so, then I know basically verbatim what it's saying. I can look at one word and know what each line is saying." Slaughter testified she said the exact words every time. Slaughter testified she had a guard mount twice a day and she said it twice a day over 2 weeks because there are part-time officers who might not have been at the prior guard mount as shifts varied. Slaughter testified she works the 6:45 shift and she is there for the 2:45 shift every day. She testified she read the guard mount memo at both shifts every day twice a day 5 days a week over a 2 week period. She then testified it was over a month because they were waiting on the new contract to get started. Slaughter then testified, "I'm just going to say over a 2-week period." Slaughter testified, "I'm going to say over a 2 week period, but I said it stays on the clipboard." She testified she read it twice a day over a 2 week period, but she did not recall the dates she read it. Slaughter testified that she heard Ortman talk about the listings concerning AEPS on the memo several times at the 2:45 guard mount which was right near his door. She testified Ortman answered questions at that time. Slaughter testified she heard Ortman say to the officers that health and welfare was going to go into their 401(k) at the 2:45 guard mount. Slaughter testified that there were six or seven officers there and she heard Ortman say this on around four occasions. Slaughter, upon looking at the document, stated that it was accurate as to timing that the changeover was 60 days away concerning when the document was read, and that it was accurate that the application process had not begun yet.

Joyce Henderson works for AEPS as a lieutenant, and she had been a lieutenant with USEC. Henderson testified there came a point when she learned how AEPS planned to operate

when they took over the contract. She testified this was shortly after they heard who had received the contract. Henderson testified when Covington was giving guard mounts he conveyed this information to her. Henderson testified that Ortman did not have any meetings with her to talk about how she was going to communicate the different terms and conditions of employment to the officers, other than when Ortman addressed the guard mount. Henderson testified the initial information she received was AEPS was taking over. Henderson testified that shortly after that she received a more detailed description at guard mount of what was going to be different. Henderson was not giving guard mounts at that time but she attended them. Henderson testified she saw documents on the guard mount clipboard that related to how AEPS was going to start operations. Henderson recognized Ortman's typewritten transition memo as being the pass along information they had on the clipboard. Henderson did not recall when it was put on the clipboard. She testified by reading the document that says 2 months before was the only way she could determine when it was posted. Henderson then testified she knew it was posted 2 months before because that was when they initially started talking about what was going on as far as AEPS coming in. However, Henderson later stated she knew it was before the date AEPS came in and took over, but she did not have independent recollection of whether it was 6 weeks, 2 months or 3 months. Henderson testified she read the document when she first saw it and the line, "with the contract change, we have a lot to do in the next 60 days," was there at the time she read it. Henderson testified she did not think the line was wrong at the time she read the document. Henderson testified that, in addition to Covington, she heard Ortman discuss some of the things with the third relief officers concerning issues on the document. She testified it was in the security office at the guard mount. Henderson testified Ortman would come out of his office and address the guard mount along with Covington. Henderson testified she heard the information on the document discussed at the guard mounts for around a couple of weeks, "because like I said everybody was assuming that AEPS would pick up where USEC left off." However, Henderson then testified Ortman never said anything suggesting that AEPS would pick up where USEC left off.

Grady Baker has been employed by Paragon as vice president, operations since January 2008. Baker was involved in the USDA contract award, and has been involved in Paragon taking over federal contracts from a competitor over 50 times. Baker testified Paragon protects federal buildings, and Paragon is in 42 states and some U.S. territories. Baker testified 90% of Paragon's work force is represented by unions, and he estimated Paragon has contracts with the 20 unions. Baker testified he is not aware of any instance where Paragon adopted the predecessor's CBA. He testified Paragon uses the predecessor's CBA to enable them to comply with the SCA to ensure the job their offer to employees meets the required wage and hour provisions. If there is no CBA in place, they look at the Department of Labor wage determination. Baker testified, in terms of the wage determination, Paragon needs to comply with wages, health and welfare, federal holidays, vacation, and depending on the region sometimes a break provision. Baker testified if there is a union in place, Paragon looks at the same terms in the prior CBA. Baker testified they do not look at other things the prior contractor was providing in the CBA because they are not relevant. Baker testified, "we are Paragon. Paragon runs their business the way we run it." Baker testified with respect to incumbent employees, he understands Paragon's obligation is they have a right of first refusal for the positions based on the Executive Order. He testified Paragon's obligation is to provide them an opportunity to remain if they meet all requirements for the new contract.

Baker served as the liaison between Paragon and the prime contractor AEPS pertaining to the USDA contract. Baker was responsible for ensuring they recruit, hire, train and put boots on the ground for sufficient personnel to carry out the portion of the work assigned to Paragon. Baker testified Paragon's process of contacting the incumbent employees and giving them a right

of first refusal is done by holding a job fair. He testified that is the first step in the process. Baker testified Paragon follows the same procedure every time they take over for a predecessor employer. Baker testified the process is Paragon reaches out either through the client or the incumbent management team to advertise the jobs for both new hires and incumbent employees. He testified Paragon posts a job fair notice that says please arrive here at this date and time, fill out an application, and that is when they have their initial contact with the employees. Baker testified they post the job notice on various online formats, and the predecessor employees will also get it through the client. Baker testified they do not ask the predecessor's management to make statements on Paragon's behalf to applicants about the benefits Paragon will provide. Rather, Paragon gives the predecessor management a flyer and states please pass this out. Baker testified the predecessor's management cannot speak on behalf of Paragon as they are not Paragon's employees. Baker testified the first point under Paragon's process at which Paragon will talk to incumbent employees about terms and conditions is at the job fair.

Baker testified for the USDA contract he posted the jobs on line. He testified they opened up the online application process in their HMS system and they passed out a job fair flyer through the client, and the incumbent manager. Baker testified the job fair was held for the USDA location around September 2013. Baker identified Paragon's job fair announcement for the USDA headquarters contract, noting it gave the date, time, location and suggested arrival time for the candidates. Baker attended the job fair. The document includes an asterisked paragraph saying "Paragon Systems is currently accepting applications for incumbent security officers only." Baker testified for the job fair they try to expedite the process and they hold the job fair primarily for incumbent officers to come in, apply, go through the process, and move into the pre-contract training as quickly as possible. Baker testified the job fair was something separate and apart from what AEPS did. He testified Paragon held its job fair in Greenbelt, Maryland. The job fair posting contains a statement that to be considered for employment, incumbents must complete all parts of the Paragon application no later than 24 hours before the job fair. Baker testified this is due to expediency in that they have a lot of people to bring in during a limited amount of time. Baker testified filling out the application correctly can take an hour to an hour and a half. He testified they do not have enough time for everyone to fill in the online applications at the job fair because they only have two available computers there. Baker explained there are other reasons for having people fill out their applications prior to coming to the job fair. One is to know expected job fair attendance, and whether they need to put in additional effort to hire enough people to make their commitment on October 28. Another reason is to have the information such as the applicant's name and address prior to the job fair to allow Paragon to prepare offer letters and applicant folders in advance. Baker testified then Paragon can get right to the business at the job fair of the offer, filling out of I-9's, etc., and then move onto getting them sized for uniforms and put into training. Baker testified by asking them to fill the application in advance, Paragon is not making an offer of employment stating it is just an application. Baker initially testified there was only one job fair at this location, but then identified another document showing there was a second job fair. Baker did not attend the second job fair. Baker testified the holding of the second job fair meant the first one was not well attended.

Baker testified the procedure at the job fair he attended was when the applicant arrived they signed in, checked with an HR or operations representative, took the application, a folder, and the offer letter. They have an opportunity to review the offer, sign it, and fill out their I-9's. They were also given company benefits documents. Baker testified there is an HR package they had to fill out. They interview with the HR rep when they are finished completing all the information. If they signed the offer, then they proceed to getting sized for uniforms and then assigned to training. Baker testified an applicant could decline the offer at that time. Baker testified Paragon offers the applicant a contingent offer letter, and that is if they pass all the

requirements for the new contract this is what they will be paid. Baker testified the applicant can take the job offer letter home and decide to sign the letter on another date but they cannot move on with the process until they sign. He testified there is an interview process at the job fair. During the interview, Paragon brings the offer and the applicant paperwork and the Paragon representative reviews the documentation with the applicant. Baker testified they are validating the applicant is qualified to continue employment on the new contract. Baker testified he would not agree that this is just a documentation review but stated it is an interview. Baker testified Lori Raines and Rick Waddell no longer worked for Paragon at the time of the trial, Raines had moved to Florida, and Waddell had moved to West Virginia.

Baker was shown the offer letter to Jones. He testified the format of the letter was the same to all the Paragon applicants at the USDA site. In the second to last paragraph it says that "Shift schedules will be determined in accordance with the operational needs of the contract." Baker testified they cannot determine schedules until closer to the start date when they know how many people they will have, and the clients complete scheduling requirements. The next sentence letter says, "Breaks will be provided in accordance with company policy and in compliance with any applicable state and federal law requirements and subject to the operational needs of the contract." Baker testified this means in accord with how Paragon provides breaks in certain locales and areas unless otherwise set forth by the federal contract itself or by the statement of work. He testified Paragon provides a certain level of breaks during an 8 hour shift or every 4 hours. He testified he is just advising the applicants Paragon will be doing that during the course of their employment with Paragon. Baker testified these offer letters were circulated at the September 14 initial job fair, which was 6 weeks in advance of the October 28 start date. Baker testified that, as of that time, he was not aware of all the things he needed to know to set breaks and shift schedules. However, Baker testified they would know in advance whether they are going to pay for the employees' lunch break. He testified if they are going to offer a benefit of a paid lunch break they would state that in the offer letter. Baker testified they did not say anything in the offer letter about providing a uniform allowance. He testified they provide wash and wear uniforms and if they did not provide wash and wear uniforms there would be an obligation to provide a uniform allowance because there would be an additional cost associated with maintaining uniforms. Baker testified they did not provide a shoe allowance because they provided shoes.

Baker testified Paragon's offer letter is a contingent offer because there are many requirements the applicants have to meet. They have to meet a training standard, they have to maintain the current or new background checks, including local tri-state background checks that Paragon conducts on personnel, they have to pass a seven panel urinalysis, and they have to qualify with Paragon's trainers on weapons, secondary use of force, etc. Baker testified often when Paragon takes over contracts he hires the predecessor's supervisors. Baker testified prior to the supervisors coming on board with Paragon they are not authorized to speak on behalf of Paragon, and Paragon is not bound by anything the supervisors say about what will happen when Paragon takes over prior Paragon taking over.

AEPS submitted a "Training Management Plan" to USDA shortly after winning the award for the USDA contract in August 2013. The document states at section 1.1 "Strategy for Meeting Training and Certification Requirements" that:

> As Team AEPS intends to carry over the incumbent contractor's guard force from the previous contract in respect to Executive Order 13495, "Nondisplacement of Qualified Workers under Service Contracts," the transition training regimen has been simplified for the incumbent staff, and will be more

manageable within the transition.

AEPS, with the help of major subcontractor Paragon Systems, Inc., has recently and successfully completed a transition into a large and multi-state contract for the USMS, as well as the FPS Utah/Wyoming and FPS Montana/North Dakota/South Dakota contract. The companies are current in their sense on how to best manage all aspects of this transition for USDA, including the training. Because of this, AEPS foresees no significant difficulties in delivering a trained and qualified guard force by the October 28, 2013 contract start date.

C. Credibility[12]

The evidence reveals that AEPS submitted a "Training Management Plan" to USDA shortly after winning the award for the USDA contract in August 2013. The document states at section 1.1 "Strategy for Meeting Training and Certification Requirements" that, "As Team AEPS intends to carry over the incumbent contractor's guard force from the previous contract," "the transition training regimen has been simplified for the incumbent staff, and will be more manageable within the transition." It was also noted in the memo that "AEPS foresees no significant difficulties in delivering a trained and qualified guard force by the October 28, 2013 contract start date." Paragon lead official Baker testified it his responsibility to ensure there were sufficient boots on the ground at the October 28 start date. Covington, who served as a major in the guard force for the predecessor employers, testified that both he and Project Manager Ortman had a concern about retaining their jobs with the new contractors. The evidence revealed that neither AEPS nor Paragon engaged in any detailed recruitment efforts until September of the predecessor guard force. Given the skill level required of the guard staff, the nature of their training requirements, and exams Respondents' officials testified they had to pass, I have concluded there was pressure on Respondents to have as many of the predecessor's guards seek employment with the new employers as possible to allow Respondents to effectively meet the required October 28 start date.

Considering the detail and content of their overall testimony, including the fact that they were current employees testifying in the presence of Respondents' management officials against the interests of their employers I have found the testimony of General Counsel witnesses Jones, Walker, and Gaines to be credible to the extent their memories would allow. In reaching this conclusion, I have considered but rejected Respondents arguments that they were officials of the Union, and their testimony was motivated by financial gain concerning a positive outcome in this case. First, the parties had reached a new collective-bargaining agreement so as far as these employees could see any financial gain was temporal, and I have weighed that against their risk of angering their employer. Moreover, the bottom line they testified in a credible fashion and what they related had a ring of truth. I have weighed that against the testimony of the Respondent's witnesses which was often vague, conclusionary, lacking in specific recall, and on occasion inconsistent between witnesses.

Walker testified she was working 4 days a week in August through October 2013, and she attended four guard mounts a week during that time. Walker testified Ortman never participated

[12] In assessing credibility I have considered such factors as the detail of the testimony, the specificity of recall, the interests of the witness, the related documentary evidence, the testimony between witnesses, how what a witness related aligns with established or admitted facts, and the witnesses' demeanor.

in her guard mounts as his arrival time was not that early. She testified some of the subjects listed in Ortman's typewritten transition memo were covered at guard mounts prior to Respondents assuming the contract. Walker testified it was discussed that: they would be changing from white shirts to blue; they needed to make sure they completed a drug screen; they would be getting new radios; and they had to provide their social security cards and driver's license. However, she testified that concerning health and welfare they did not say at the guard mounts that the health and welfare would go to insurance. Walker testified what was said was they needed proof of insurance. She testified they were not told they were going to be required to take health insurance with AEPS at that time. She testified they were not told the consequence of not having outside health insurance during the guard mounts she attended. Walker testified that prior to the changeover there were no guard mounts in which the employees were told they would be receiving a 30 minute unpaid lunch break. She testified it was also not stated immediately after the changeover. In this regard, Walker testified when she began working for AEPS on October 28, she continued to receive paid lunch breaks for a period of time. Walker identified pay stubs showing she continued to receive a paid lunch break as late as November 29. Walker testified when she asked Ortman about a subsequent loss of 30 minutes in her pay she was told they were deducting a half an hour for the now unpaid lunch break. Walker testified the uniform allowance was a line item in her pay stub when she worked for the predecessor employers. Walker testified she did not learn AEPS was discontinuing her uniform allowance until she received her first paycheck for AEPS and it did not have a line item for uniform allowance. Walker testified it was not until the beginning of 2014, in her capacity as shop steward, that she learned AEPS would not offer a shoe allowance.

Gaines testified she attended a guard mount at the start of every shift. At the hearing, Gaines was shown a copy of Ortman's type written memo which Respondents claimed was a guard mount talking point. Gaines testified she had not seen this document prior to the hearing. She testified the items in the document were not covered at the guard amounts she attended. Gaines testified there was never an instance at a guard mount where the supervisor said she would be receiving a 30 minute unpaid lunch break. Gaines testified she would have recalled hearing that because it would have altered her pay. Similarly, Jones testified he never heard a guard mount supervisor talk about the substance of the typewritten Ortman memo. Jones testified he was never told during the guard mounts he was going to receive a 30 minute unpaid lunch break when AEPS or Paragon took over. Jones testified during the last 90 days while he was working for USEC, he was working the 11 to 7 shift. Jones testified Covington and Ortman never conducted guard mounts Jones attended. Jones testified his breaks first changed to unpaid 30 minute lunch breaks a couple of weeks after Paragon and AEPS took over the contract. Jones testified his breaks were not changed the first day of his employment. Jones testified it was after AEPS and Paragon assumed operational control that he learned that he was no longer receiving an hourly uniform allowance. Jones testified he learned that, "When we got our first paycheck." Jones testified that, at that point, no one from the company had told him that he would not be receiving a uniform allowance. Jones testified that prior to October 28 he was never told by a representative of either company that the shoe allowance would be discontinued.

Devers testified, that during the transition period, he provided Ortman with various instructions to give to employees. Devers testified he told Ortman initially Devers was not sure of all of the parameters of the USEC working conditions. He testified the guards hourly rates would be the same, health and welfare would be directed either to a companywide health insurance or a 401(k) in that if someone had insurance and showed proof of it goes to the 401(k). If they do not have proof of health insurance it goes to the health plan and the remainder goes to 401(k). Devers testified he told Ortman whatever questions he received to contact Devers and they would compile a list and answer everyone's question at one time. He testified he received a call

from Ortman who had several questions he had received which Devers answered. However, the only specific item Devers addressed in his testimony as a follow up question by Ortman pertained to shoe allowance about which Devers testified they were providing shoes so there would not be a shoe allowance. Devers testified he told Ortman to answer all the officer's questions and pass it along to anybody he came in contact with and to let the supervisors know so they could let everyone know at guard mounts.

Ortman testified he was interacting with Devers as early as August. Ortman testified that about a week after they met, he and Devers began to discuss the transition to AEPS. Ortman testified they discussed some of the initial terms and conditions of employment that AEPS would set. In terms of terms and conditions of employment of the officers, Ortman testified they talked about how the breaks would work and how they would change. Thus, Ortman did not confirm Devers testimony that health and welfare allocations were part of their early discussions.

Ortman testified that, while working for USEC, he communicated with security officers at guard mounts. Ortman testified they received a lot of questions from the officers relating to pay and health and welfare. Ortman testified the officers also wanted to know how it would be determined who worked for which company, what the minimum hours for work would be full-time benefits, would the hours change, would the schedule change, and would post assignments change. Ortman testified he wrote down questions so he could go over some of them with Devers. Ortman identified a document in his handwriting, entitled "Questions for George." Ortman testified he wrote the six itemed document in mid to late August. The second item reads, "2. Pay, sick leave, 401(k), insurance, breaks, ???" Ortman testified after he generated the document he talked to Devers. Ortman testified he made notations concerning his discussion with Devers, and he identified another document he generated based on those discussions. The second item on this cryptic response sheet list relates to pay, H & W, 401(k). Ortman testified Devers stated the pay will stay the same, health and welfare would go to an insurance benefit or 401(k) plan. Thus, if as Devers contended he discussed health and welfare allocations with Ortman early on, it is unexplained why Ortman had to ask him again about it. Moreover, Ortman, the project manager of a large numbers of security guards, failed to date both the handwritten memos upon which he principally relied for his testimony.

Ortman testified his notes continue beyond the six items raised in his initial question sheet in that on the second page his notes show he discussed shoes, schedules and tasks with Devers. Ortman testified that at the time it was stated that AEPS was going to provide shoes as part of the uniform. While the only item Devers specifically testified was discussed with Ortman pursuant to officers' questions was the discontinuance of the officers' shoe allowance, Ortman testified he did not recall if he even asked about a shoe allowance for the officers. While Ortman testified they talked about the reduced pay for training, the diminution of that benefit did not make it into the list of items Ortman purportedly typed up to be read at the guard mounts. Nor, did the number of hours required to be a full-time employee. Moreover, Ortman's notes did not contain a specific directive from Devers that pay for lunch breaks would be eliminated, although that statement did make it into his typewritten list.

Ortman testified he took the notes he had generated from his discussions with Devers and Ortman put a together a 10 bullet typewritten statement that the supervisors could read to the officers at guard mount. Ortman estimated he prepared the document at the end of August or about 60 days prior to the October 28 startup because of the language contained in the document supported that time table for its dissemination. Ortman admitted he had no independent recollection of when the document was created. Again, the document itself was undated. The document contains the statements that: "H & W will go to insurance or 401k";

"Lunch breaks will be reduced to 30 minutes unpaid with a 10 minute paid morning break," and "shoes will be provided by the company." It does not specifically address the elimination of the uniform or shoe allowance.

Ortman testified the document was placed on a clipboard that the supervisors use when they do a guard mount to be read to employees at the guard mounts. Ortman could not recall if he put the memo on the clipboard or if he gave it to Covington to put on the clipboard. Ortman testified he had a discussion with the supervisors before giving them the document to place on the clipboard. He told them about the conversation he had with Devers and some of the changes that were going to be taking place, how to get the information out, and how to take questions from the officers. Ortman testified the employees worked 5 days a week, some less some more and that on average the document would have been read to them 20 times during a month period if Ortman's instructions were followed. He testified the guards would have heard the memo read to them at least once a day for the days they worked during this 30 day period. Ortman testified the document was read at the guard mounts starting at the end of August. On cross-examination, Ortman confirmed that his typewritten memo was read for 30 consecutive days at guard mounts, and employees who worked 5 days a week would have heard it read 20 times. Ortman repeatedly testified that guard mounts using this document were done for at least a month. When asked if the document was read four times a day for a month, Ortman responded, "It's read at each guard mount, correct. The same officers don't attend the same guard mounts, yes."

Ortman also testified the guard mounts take place in the security office, and they are conducted right outside Ortman's door. He testified he heard or attended guard mounts where this matter was discussed. Ortman testified officers Jones, Gaines, Mozon, Swann, and Coffer complained about the announcement, and the majority of the staff complained at the guard mounts. He testified Jones and Mozon complained about health and welfare, non-paid breaks, the lunch breaks, the reduced 15 minutes to a 10-minute break. He testified officers Coffer, Mozon, Robin, Tilghman, Petway, Proctor, Timisha Fitzgerald (Walker) and Swann complained about the same things. Here, Ortman's testimony appeared to a general listing of officers names without much substance to any actual complaints. Moreover, while he listed Walker and Jones as some of the protesters to these announced changes, they each credibly testified that Ortman did not attend any guard mounts they attended because he was not on duty at the time their guard mounts were given.

Covington testified Ortman had a supervisor's meeting and when the meeting was over they were instructed to get information out to the officers. Covington testified that Ortman told them to use the guard mounts to pass out this information. Covington testified Ortman's typewritten memo concerning the AEPS transition was given to him by Ortman to put on the clipboard for the supervisors to pass the information to the officers. However, contrary to Ortman, Covington testified Ortman did not give any instructions as to how long it should stay on the clipboard. Covington testified he did not tell anyone that it needed to stay on the clipboard for 30 days. Covington did not recall the date he received the transition document from Ortman, but could only estimate based on the memos content. Covington testified that at the first guard mount he went over the Ortman memo by each bullet. However, he testified he did not go over it bullet by bullet each time he reviewed it. Covington testified in the beginning he would go through it point by point Monday through Friday and he did that for the first 2 weeks or so. Covington testified that after 2 weeks he asked if everyone was familiar with the health and welfare and the 30 minute unpaid lunch breaks and most of them would say yes. He testified if they did not he would go into it in detail. Covington estimated it was on the clipboard 20 to 30 days, he did not know the precise amount of time.

Slaughter works for AEPS as a lieutenant, and had worked for USEC as a lieutenant. Slaughter testified there was a point when Ortman met with her and the supervisors and gave them specific information about how AEPS planned to operate. Slaughter testified that Ortman gave instructions about how to communicate this to the officers stating it had to be at the morning and afternoon guard mount. Slaughter identified Ortman's typewritten memo as one of the pass-ons for the guard mounts they received prior to AEPS coming aboard. Slaughter testified she used the document at the guard mounts over a 2 week period and it stayed on the clipboard for over a month. Slaughter testified she said it twice a day over 2 weeks because there are part-time officers who might not have been at the prior guard mount, and the guards shifts varied. She testified that she read it twice a day 5 days a week over a 2 week period. She then testified it was over a month because they were waiting on the new contract to get started. Slaughter then testified, "I'm just going to say over a 2-week period." Slaughter testified, "I'm going to say over a 2-week period, but I said it stays on the clipboard."

Henderson works for AEPS as a lieutenant, and she had worked for USEC as a lieutenant. Henderson testified there came a point when she learned things about how AEPS planned to operate when they took over the contract. She testified this was shortly after they heard who had received the contract. Henderson testified Covington who was giving guard mount conveyed this information to her. Henderson testified Ortman did not have any meetings with her to talk about how she was going to communicate the different terms and conditions of employment to the officers, other than when he addressed the guard mount. Henderson testified she was not giving guard mounts at that time but attended them. Henderson testified she recognized Ortman's typewritten memo. Henderson did not recall when it was put on the clipboard, except by reading the document itself. Henderson then testified she knew was posted 2 months before AEPS took over because that was when they initially started talking about what was going on as far as AEPS coming in. Henderson testified that she heard the information on the document discussed at the guard mounts for around a couple of weeks, "because like I said everybody was assuming that AEPS would pick up where USEC left off."

The testimony of Respondent's witnesses concerning the discussion of Ortman's 10 point memo was inconsistent between witnesses as to the instructions Ortman gave as to the frequency and length of time the memo was to be discussed. The witnesses' testimony was vague and internally inconsistent as to when they first saw the memo, and as to how often it was discussed at the guard mounts. The memo itself was undated, as were Ortman's handwritten notes which he claimed he relied on to create the memo. The testimony of the witnesses vacillated based in their reference to the memo, and had a quality that it was being made up as it went on in order support Respondent's position. The testimony also reflects that all guards both future Paragon and AEPS employees attended the same guard mounts depending on their shift times. While Ortman maintained he had nothing to do with the Paragon hiring process, and he would not give information to the guards pertaining to it, he made no such disclaimer concerning Paragon in his typewritten memo which he claimed to have had read at guard mounts, nor did he or any of the supervisors testify such a disclaimer was made to prospective Paragon employees concerning the information on the memo when they attended the guard mounts. In fact, Covington, an eventual Paragon official claimed to have participated in the reading of the memo at the guard mounts, in which pursuant to his testimony all guards participated. Moreover, Ortman claimed that Jones, a future Paragon employee, protested is contents, a claim which I have discredited.

Accordingly, I have credited the General Counsel's witnesses that Ortman's memo as tendered by Respondent at the hearing was not read at the guard mounts, and that the

predecessor employees were not informed of the elimination of cash payments of health and welfare funds, the elimination of paid lunch breaks, and the elimination of the shoe and uniform allowance during the guard mounts. This conclusion is verified by the fact that Walker's pay stubs revealed she continued to receive paid lunch breaks for at least a 30 day period after Respondents October 28 takeover. It is clear someone from management did not get the message despite Ortman's now discredited claim that this was stated by Respondent's supervisors daily four or five times a day for a 30 day period. I have considered Respondent's argument that Walker admitted hearing some of the less controversial items contained in Ortman's memo stated at guard mounts. I do not find this sufficient to establish that Ortman's memo was read as submitted at trial, nor that the items the General Counsel's witnesses uniformly denied were discussed at guard mounts. I also find the variance in testimony of Respondents' witnesses on this issue was more than due to the vagaries of their respected memories due to the lapse of time as Respondents contends in their brief. Rather, I find their testimony varied because they never received the instruction to read the memo as Ortman contended, and the ambiguous nature of the testimony of the supervisors concerning the time period the memo was purportedly read, was an after the fact effort to bolster Ortman's incredible testimony that it was read verbatim, every day, at multiple guard mounts each day, for 30 days.

Walker testified she received an offer letter from AEPS on October 17 via email. The offer had Ortman's signature and states Walker was being extended a contingent offer of employment to work for AEPS with an effective date of October 28. The offer contained listed employment information including stating fringe benefits will be directed towards a company sponsored medical plan, or under certain circumstances, towards a company-sponsored 401(k) account, pre-tax. The email states, "Training will be paid at a rate of $8.25 an hour." The email states Walker's employment is at will, which included the employer's right to terminate Walker without notice or cause. The email stated, "If you intend to accept employment with AEPS, please print this letter, sign it, and give the signed letter to Ortman by October 28. Walker testified when she received the October 17 email she went to speak with Ortman concerning issues in the email. The conversation took place in Ortman's office. Walker testified she told Ortman she had some concerns regarding the letter in reference to health and welfare issues and the rate for training pay. Walker testified Ortman, "stated that as far as the health and welfare is concerned, that he was on the phone speaking with the company currently in reference to this matter." Walker testified she told Ortman, "if they're going to take our health and welfare, that I'm not going to be signing this letter." Walker testified Ortman said, "this is basically a general letter that we received for employment and not to worry about it. And that as long as we, you know, as we do our part, he'll do his part in reference to that." Walker testified Ortman's statement that "we do our part" was in reference to "we the Union." Walker testified Ortman said, "he'll do his part. He'll be talking to the company in reference to it." Walker testified upon Ortman's "reassurance that this was basically a general offer letter and that he also stated that he didn't think so, as far as them taking our health and welfare and things of that nature, I signed the letter." Walker testified in terms of taking their health and welfare that meant the employees would not be receiving their health and welfare as a cash benefit, but they would receive it in some other form.

Similarly, Gaines testified when she received her offer letter from AEPS, she phoned Ortman. Gaines testified she told Ortman she was calling about the offer letter and she said it states they were going to get $8 and some change in training pay and they were going to take their health and welfare. Gaines asked Ortman what was going on. Gaines testified, "He said don't worry about it, it's a general letter, go ahead and sign it, everything will be okay." Gaines testified after she spoke to Ortman she signed the offer letter, and gave it to Ortman when she returned to work.

Jones attended the September 14, Paragon job fair when he was given the Paragon offer letter for employment which set forth certain terms of employment at Paragon which were different than Jones' existing benefits. Included in the letter was a statement that Jones would be offered the company's sponsored health/dental benefits under the terms of the company's plan. It stated if Jones chose not to receive health and medical coverage, the health and welfare hourly rate indicated in the appendix would automatically be contributed into a company sponsored 401(k) retirement plan, pre-tax, for Jones' benefit. It stated, "You will not have the option of receiving a cash payment in lieu of health and retirement benefits." The letter stated that Paragon considers a full time employee one who works an average of 40 hours per week. Jones signed and accepted the offer letter on September 14, and he turned it in to Paragon, along with the hiring packet. Jones testified on re-direct exam that the day he received his offer letter from Paragon, Jones called Ortman and the conversation took place right after Jones had departed the September 14 job fair. Jones had already submitted his signed offer letter at that time of the call. Jones told Ortman about the offer letter and Ortman asked him what it said. Jones testified he told Ortman what it said and Ortman stated that "American Eagle was the prime and that nothing was going to change, everything was going to stay structurally the same, and not to worry about it." Jones testified he told Ortman about the offer letter over the phone "because it was a grave concern of a lot of officers." Jones testified he told Ortman about Paragon taking their health and welfare stating that was the main concern. Jones testified Ortman said Paragon is the subprime and AEPS is the prime, and they have to do what AEPS does.

Ortman denied having any conversation with Walker about her offer letter. Ortman testified the offer letters were basic, the officers came in, he had the officers read them, and then sign to accept or not accept. Ortman testified he asked the officers if there were any questions and there were no questions when it came to the offer letters. Ortman testified he met with every future AEPS officer about 65 individually about the offer letter and that none of them had a question about it. Ortman testified that, when he met with Walker she did not say anything along the lines of she really did not want to sign it and she did not agree with the things that are in there. He testified she accepted the offer. Ortman denied saying anything suggesting Walker could ignore what was in the letter. He denied telling Walker not to worry he was going to work this out with AEPS and she was not going to have to do any of the things in the letter. Similarly, Ortman testified he did not remember any phone conversation with Jones about his offer letter or whether he was willing to sign it. He denied having a conversation with Jones in which Jones said something like he was not sure whether he should sign the offer letter and he was not happy with the things in it. Ortman denied telling Jones that he did not have to worry about what was in the letter and Ortman would take care of it. Ortman testified he did not have such a conversation because Jones works for Paragon and Ortman had nothing to do with his offer letter.

I have credited the testimony of Walker, Gaines, and Jones concerning their conversations with Ortman about their offer letters and the content of those conversations over Ortman's denials. Each were employees and union officials, and the Respondents announced changes to health and welfare and other matters in their offer letters, likely would have created questions and concerns amongst them, along with their co-workers. Thus, as they credibly testified, it is likely that they would have raised questions about those letters to Ortman, the project manager, who was working with and for AEPS, and whose name in particular was on the AEPS offer letters. On the other hand, Ortman's testimony that he met with 65 officers individually concerning the AEPS offer letters, asked each if they had any questions, and not one of them had a question is simply not credible. This is particularly so, given the substance of those letters. Moreover, the AEPS employees did not receive their offer letters until October 17, just 11 days before Respondent was to take over the operation. AEPS had given assurances to

USDA that they would be staffed and up and running by October 28. Similarly, Baker testified it was his job with Paragon to make sure there were sufficient boots on the ground. Ortman, who had a concern at the outset of whether he would have been retained by AEPS was likely feeling the pressure of ensuring that his new employer was adequately staffed. Thus, the three employees credibly testified as to the circumstances and the content of their conversations with Ortman, and his denial of those conversations lacked credibility for the reasons stated.

While, Respondent challenges, in its brief, Gaines' testimony stating she did not give an affidavit, that she was only first called on rebuttal, and the language she reported in her conversation was similar to that reported by Walker, I have not found these arguments sufficient to discredit Gaines. First, as stated, Ortman's claim that he met with 65 employees in his office concerning these offer letters, which largely impacted in a negative fashion on the terms and conditions of employees benefits, and not one of them had a question is simply not credible. I also note that both Jones and Walker gave pre-hearing affidavits, and Respondent's counsel, on cross-examination failed to point out the omission of these reported conversations with Ortman in those affidavits. Finally, while Gaines testified to similar remarks to what Ortman provided her in response her questions as to what had been previously reported by Walker in her testimony, it is not so unlikely that Ortman would have given both Walker and Gaines a similar response to a similar question that requires me to discredit Gaines. Rather, I find, in the circumstances here, given the reported benefit changes, they would have questioned Ortman about them; and I find that Gaines did as she stated.

I have considered the fact that Jones only first brought up his conversation with Ortman on redirect examination. However, concerning the broad scope of Jones' testimony, I do not find this omission sufficient to discredit his otherwise credible testimony concerning the conversation. Moreover, Ortman's claims that he would not discuss the offer letter with Jones, a future Paragon employee, because Ortman had nothing to do with Paragon, while at the same time he maintained he ordered daily discussions about future benefits at guard mounts which were attended by a mixture of future AEPS and Paragon employees is inconsistent on its face. I also do not find Respondents argument persuasive that Ortman would not have made statements contrary to the policies AEPS through Devers and Paragon had relayed to him at the time about employee benefits because to do so would go against his own employment interests. First, what was actually conveyed to Ortman by Devers and any other management officials during the time of these events is known only to them, and as supplied at trial at a future date is likely to be self-serving. See, *Shattuck Denn Mining Corp. v. NLRB,* 366 F.2d 466, 470 (9th Cir. 1966), holding "it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book." While this case does not involve allegations of discrimination Ortman's motives as to what he portrayed was discussed in his conversations with Respondents' officials is certainly in play. Second, Respondents at the time they began their hiring process, particularly in view of the government shut down during this period, were under admitted pressure to staff by October 28. Thus, as I have found there was pressure on Respondents' officials, including Ortman to convince the current guard staff to retain their positions, as Respondent reported to USDA in its bid, and as Jones, Walker, and Gaines credibly testified.

Walker testified her name has also been Timisha Fitzgerald, and that currently Fitzgerald is her middle name. Walker testified in mid-September 2013 she saw a posting on the officers' bulletin board that Paragon and AEPS would be taking over the USDA contract. Walker testified the memo stated the security officers needed to see Ortman in reference to the new contracts to

find out which company the employees were assigned to. Walker spoke to Covington prior to speaking to Ortman. Covington told Walker to speak with Ortman in reference to which company she would be assigned to and the officers would probably have to provide their email addresses so they could be sent to a link as Covington believed everything would be done online. Around 2 days later, Ortman called Walker and told her she should give the company her email address so they could send her the employment link to apply for employment with AEPS. Walker gave her email address to her supervisor the night of Ortman's call. Walker testified she received an email from AEPS on September 23 providing an on line link for employees to begin the AEPS application process. Walker testified that other than the link there was no substantive writing in the email. While she described the email as an offer of employment, Walker explained it said, "if you wanted to apply for employment with AEPS, that we needed to go to the link and follow the link." Walker clicked on the link from the email and it took her directly to the AEPS application process. Walker testified that the link eventually took her to different policies she needed to sign off on. Walker testified she submitted a resume at the time she submitted her application. Walker testified she completed her online application on September 25. She testified that while she was filling out the application she also completed the federal and state tax forms and the I-9 form. Walker testified that, during that time, she also reviewed: a nondisclosure agreement; a sleeping-on-the-job policy; and a zero tolerance acknowledgment. Walker testified she filled out or reviewed all this information while completing her application on line. She testified this was all part of the application process. Walker testified she had to complete her certification dates for her CPR/first aid, AED, and she also provided direct deposit information while filling out her application. Walker received confirmation by email on September 25 from AEPS that they received her application. While she found emails from AEPS dated September 25 and October 17, Walker could not find the email she received on September 23 containing the link to the application. Walker explained the reason she no longer retained the email with the application site link was because she had received the September 25 confirmation email.

Walker testified that, after she received the email offer letter from AEPS on October 17, she was never sent any other online link by AEPS. Walker testified that the last time she completed any hiring related documentation for AEPS was the offer letter on October 18. Walker testified that an AEPS computer printout with the name at the top stating Timisha Donnatta Fitzgerald Walker appeared to be unusual because in 2013 she was not using her married name which was Timisha Donnatta Fitzgerald Walker for work purposes. Walker noted the printout contained employee typed signature acknowledgments dated November 20, 2013. Walker testified she did not create any employment files in 2013 under the name to Timisha Walker. Walker testified she changed her name for work purposes to Timisha Walker in late April or early May 2014. Walker was shown a similar AEPS printout where her name appeared as Timisha Donnatta Fitzgerald, which contained typed employee policy signature acknowledgments by her dated October 21, 2013. Walker testified she never went through the policies and acknowledged them a second time. Walker testified she submitted one application, and within this application process, she had to complete these acknowledgements all at the same time. Walker testified that no AEPS representative ever told her there was a problem with her policy acknowledgements. She testified she never completed the policy acknowledgments separate from her job application.

Similarly, Gaines testified that around the middle or end of September the supervisors asked them for an email address to enable AEPS to email a web link so they could get into the AEPS system. Gaines testified she received an email from AEPS with the link to get into the system to get an application. Gaines testified there was no substance in the email, except for the link. Gaines used the link to apply for employment. When she followed the link it enabled Gaines to complete "All the stuff that you would fill out for employment. We had banking

information was in there, W-4s was in there, harassments, that kind of -- everything that you would fill out." Gaines testified there were policies and a handbook policy there. Gaines testified you had to acknowledge the policies on line by checking off on them. Gaines thought she filled out the online application in early October. Gaines testified she completed the application within a couple of days after she received the email link. Gaines testified that after she completed the application, she never used the link again to go back on line and complete any other information. Gaines was shown a questionnaire which she testified was part of her application to AEPS. She testified that she completed the information on the document. The date on the application is September 26, and Gaines testified she had no reason to doubt that date. Gaines was shown another document which contained the heading acknowledgment signatures. She recalled going through a series of pages and having to read different documents and acknowledge them by clicking an acknowledgement. When Gaines was asked if she had any reason to doubt that she did this on October 19, which was reflected on the document, Gaines asked why it was a different date from the other document which showed September 26. Gaines testified that she thought she filled out both documents together as part of one packet. Gaines recollection was that she completed the policy acknowledgment signatures at the same time she completed the job application. Gaines testified she received a job offer from AEPS. She did not recall the date she received the letter, but stated she signed it on October 17. Gaines testified that after receiving the job offer letter she did not go back on line and complete additional information for AEPS.

Ortman did not recall the exact date the application process began. Ortman testified he spoke with Devers on the phone and determined the best way to do the application process was to set up a workshop for the officers before and after duty, on their days off, and during their breaks. He testified they set up workstations in the security office, but they did not have to do the applications in the security office. They could have done them at home on the computer. Ortman testified they communicated to officers about doing the application by posting it on the board and verbally at guard mounts. However, Ortman did not retain copies of what they posted on the board as USDA had changed the computers and Ortman testified he lost all his information. Ortman testified officers completed applications and the next step after the applications was the offer letter. Ortman testified the officers got the offer letters by email. Ortman testified the officers also had to complete I-9's and he had staff assisting him for everyone to complete the paperwork. He testified it involved each person coming down and doing the workshop. Ortman testified the additional paperwork was completed in the security office and on line. He testified they were two computer stations at the security office for the use of the officers. Ortman testified the officers had to complete the paperwork at the stations in the security office and they could not complete the second part anywhere else. Covington testified that he did not have anything to do with the AEPS application process. Covington testified that he did not do anything in terms of trying to get email addresses from the officers. Covington testified he never had any conversations with Fitzgerald in which he asked her for her email address so he could have it for the application process.

Devers testified that in terms of AEPS's application process for USDA they had just switched to an online system employing an IT provider called Kwantek. Devers testified information was relayed to Ortman to have the officers go on AEPS' website under employment. They could then search by job which would be USDA DC HQ. Devers testified whenever AEPS is starting a new job site there is a clickable link on the AEPS site which takes the person to the initial application phase. At that point, they enter their personal information including name, address, phone number, personal email address and they complete the application portion of the process. Devers testified they had not used this online process before the USDA contract. Devers testified for the application portion of the process no email with a link was sent to people in advance asking people to apply because they would not have peoples' email address and it

would not be loaded into the system. He testified the purpose of the application phase was to allow them to enter their email address within the system. Devers testified he never asked Ortman to collect peoples' email addresses. Devers explained an applicant for a USDA job, would go to the AEPS website, then go to careers and opportunities and there is a search block where the applicant can search all the jobs available in DC coming up and they click on the one they want to apply for. Devers testified the employees would know to go to the website because the information was given to them by Ortman for incumbents. However, Devers did not know whether the information was given to the guards as to the website by Ortman verbally or in written form. He did not give Ortman any instructions on how to distribute the information stating that he was just to make sure everyone knew to go to the company website to start the application process.

Devers testified the application process began around mid-September. Devers testified the Kwantek software issued a report listing the dates when each person completed the AEPS application. Devers testified the report showed Timisha Fitzgerald (Walker) completed the application on September 25. Devers testified when someone is filling out the application they are not able to fill out W-2 and W-4 forms, policy acknowledgements and things of that nature. He explained it is a three-step process, and that occurs later in the process. Devers testified the next step in the process, after the applications were received, was AEPS sending of offer letters, which Devers testified was delayed due to a government shutdown, which he believed took place from October 1 through 16. Devers testified the template for the offer letters is loaded into AEPS's Kwantek system. He testified it then generates its offer letter with a person's name, address, and then emails it directly to their personal email. Devers testified all applicants contained on the applicant list received a contingent offer letter on October 17.

Devers testified that the process of signing off acknowledging the receipt of employer policies, viewing the handbook, W-4 forms completion referred to as the onboarding process could not have been done before the offer letter was sent out because AEPS had to supply Kwantek with onboarding documents to upload in the system, and that was not done until October 16 or 17. Devers identified what he testified was an internal email dated October 8 stating new onboarding with Kwantek will be up by the end of the week. Devers testified Kwantek ran into some problems and it was delayed. He testified that Tara Devers, who sent the October 8 email, is Devers' wife, but she is also the contract administrator for AEPS. Devers testified that no one could have accessed and filled out information on the system for the onboarding portion prior to October 8. Devers estimated the onboarding would have been available to Ortman around October 12 or 14. He testified then it would have been available to the field around October 16 or 17.

Devers testified the onboarding stage is the third step to the application process. He testified it is done in three parts, application, offer letter, and then onboarding. Devers testified when someone starts using the onboarding process Kwantek sends an automated response to the person who is listed as the manager and to the person in charge of the manager called the admin. Devers testified for this job Ortman was the manager and Devers was the admin. Devers testified Respondent's Kwantek records reveal Walker completed the onboarding process on October 21. He testified the onboarding process is that after you complete all the paperwork, you sign stating you have received notification of the handbook; a drug/background check; sexual harassment, zero tolerance policies; your state and federal tax forms; and everything in your normal hire packet. Devers testified some of these Walker would be acknowledging receipt and some she would be filling out online.

Devers identified a computerized employment document stating the information was filled out by Walker, as per the document, on October 21, when she signed all AEPS policy acknowledgments. Devers testified all of these documents were required to be signed before Walker's beginning employment with AEPS. However, Devers testified inadvertently the manager was listed as the wrong person on the document so the document had to be re-executed by some of the employees and the manager who viewed the document. When the documents had to be redone the employee would have to click on the e-signature each time, and it would show a different date and time. Devers identified a computerized document pertaining to Walker, which he testified reflects the time she e-signed the listed company documents. He testified once the documents are signed an employee would have no reason to go back and redo the documents unless the document was misfiled, or there was a name change, or something of that nature. While Devers testified it would only make sense for employees to fill out these documents prior to being employed, he testified in the Kwantek system once someone entered the system, i.e., to change their state tax form it would show a new date for acknowledging AEPS policies, although it did not mean the employee re-acknowledged the policies at that time.

Devers testified the document pertaining to Walker shows there was a change to her profile on October 21. Devers testified on the printout containing the October 21, acknowledgments, on the second page the manager's signature is blank, and the administrator is signed off as Tara Devers. Devers testified the manager's signature should have been Ortman's, and the administrator should have been himself. Devers testified this creates a problem for the approval process of being sure everything was completed correctly. Devers testified the manager's signature is the most important as it relates to the I-9 form. Devers testified AEPS will be fined for having that information wrong because the I-9 is not complete and not proper. Devers testified the I-9 was not properly done because there is no manager's signature listed inside the block, and Tara Devers is listed as the administrator when she should not have been. Devers testified the I-9 was completed on the date shown on Fitzgerald (Walker's) next record as the signature date. Thus, the record contains two computer printouts for Walker one showing an October 21 acknowledgment date for AEPS policies; and another showing a November 20 acknowledgment date for those same policies. Similarly, Devers identified a computer document from the Kwantek system concerning employee Cynthia Bryant's new hire paperwork showing two different policy acknowledgement dates by Bryant, one on October 21, and the other on January 26, 2014, which he attributed to a problem with the Kwantek system.

Here, both Walker and Gaines credibly testified Ortman and the supervisors solicited their email addresses so they could be sent an email with a link to begin AEPS application process. Walker testified that Ortman specifically called her and told her to provide her email address to her supervisor. While Walker testified she had previously spoken to Covington about the application process, she never claimed Covington was the one who solicited her email address. Covington did not deny having a conversation with Walker about the matter, he just denied soliciting her email address, thus I do not find he contradicted her testimony. Ortman's testimony about the application process was vague. He never denied requesting the email addresses of the predecessor employees. He could not recall when the application process began, but maintained he spoke with Devers about it by phone and they concluded the best way to do it was to set up a work shop with work stations at the security office, but admitted employees could do it on their home computers. Ortman testified they communicated to officers about doing the application by posting it on the board and verbally at guard mounts. Ortman conveniently testified he did not retain copies of what they posted on the board as USDA changed the computers and Ortman lost all his information. Devers testified as to a somewhat complicated way in which the incumbent employees were supposedly told to access the AEPS website, do a

search on the site and then find a link for which they could apply to the USDA jobs. He testified he did not tell Ortman how to impart this information to employees, although Ortman claimed somewhat to the contrary they had discussed formulating workshops to assist employees in the application process. Regardless, considering the substance of their testimony, I find that Walker and Gaines credibly testified their email addresses were solicited Ortman, and by the supervisors pursuant to his instructions, and then the employees were sent an email with the link to the AEPS application process in the email.

Whether AEPS generated the individual emails with the application link, or Ortman and his staff collected the email addresses and imbedded the link in an email sent to the applicants, I find the employees were sent such an initial email with the application link as Walker and Gaines testified. First, Walker and Gaines credibly testified this was how it was done. Second they received these emails in mid to late September which was only about 6 weeks before Respondents' start date. Noting there were over 60 incumbents who had to apply in a short period of time the most efficient way to enable them to do so would be to directly send them the link to the application as Gaines and Walker testified. I do not find AEPS tried to explain to a large number of employees how to do a somewhat complex search for the link on AEPS' website as Devers tried to convey in his testimony. I do not ascribe this credibility finding solely to a possible lack of efficiency. Rather, I do find Walker and Gaines credibly testified they were requested to provide their email addresses by the supervisory staff at Ortman's behest, and thereafter were directly emailed a link to AEPS application process. While Walker failed to maintain a copy of the initial email with the link, which she described as an offer of employment, she went on to explain that it was an offer to apply for employment. Noting that Ortman failed to keep a hard copy of some of the postings to employees during this time period, I do not find it sufficient to discredit either Walker or Gaines over Walker's failure to keep a copy of this initial email, particularly when, as she explained, AEPS shortly thereafter sent her a confirmation email of the receipt of her application.

Finally, both Walker and Gaines testified they completed much of their employment related materials, including tax information, I-9's, and signing off on policies at the same time they filled out their application in September. Devers, on the other hand, testified Respondent's process and records reveal that employees would not have filled out this of this material until after they signed off on Respondent's contingent offer of employment in mid-October. Yet, here again Respondent's position is somewhat flawed. Devers admitted that Respondent only first started using the Kwantek software for the USDA contract. Moreover, his testimony revealed there were flaws in the system at that time, including the fact that his wife was listed as manager and admin on some of the computer generated employment documents when she should not have been listed as either. This required, in Devers' point of view that some of the documents had to be redone. Thus, Walker and employee Bryant, according to AEPS computer documents had two different sets of dates as to when they signed off on the same policy acknowledgements in terms of the employment process. For example, AEPS records showed that Walker signed off on AEPS policies both at the end of October and at the end of November, although she began employment with Respondent on October 28. Devers admitted that an employee would have no reason to sign off on the policies twice, and that it should have done prior to Walker's starting employment. It appears the Kwantek software, at least during this time period, was generating new dates about certain events each time an employee's computer file was entered. These changes to the dates could have been made regardless of whether the employee or someone else opened the file. Thus, the dates presented by AEPS based on these documents were not reliable. I also do not view the October 8 document identified as an internal email that the onboarding process was going start the following week to require a different result. In this regard, the person who formulated the email did not testify, and I do not find this document alone is sufficient to overcome the credible testimony of Walker and Gaines as to how they received

their employment applications and when and how they filled out their related employment materials.

D. Analysis

The General Counsel asserts in essence a two prong approach in support of its complaint. First, it is asserted the Board's decision in *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), should be overturned as it is inconsistent with the language in the Court's decision in *NLRB v. Burns Security Services,* 406 U.S. 272, 294-295 (1972). The General Counsel requests the Board to overturn *Spruce Up* and that Respondents should be found to be "perfectly clear" successors as contemplated by *Burns* because the evidence establishes Respondents unquestionably intended to retain the predecessors' work force. It is asserted this is all that is required by the *Burns* Court.

The General Counsel argues, in the alternative, Respondents are "perfectly clear" successors under the Board's current *Spruce Up* test. It is contended Respondents never announced an intent to establish new terms and conditions of employment before informing employees which company they would be working for, issuing job fair memoranda and application packets with no indication of changes to employees working conditions, as well as having approximately 75% of unit employees – those who would be hired by AEPS complete new hire documentation contemporaneously with their application. It is contended by failing to announce their intention to establish new terms until its respective offer letters, AEPS became the "perfectly clear" successor well before it announced changes to initial terms and conditions and violated Section 8(a)(5) and (1) of the Act by subsequently changing employees' terms and conditions of employment. The General Counsel raises a similar argument concerning Paragon citing the specific circumstances pertaining to that employer. The General Counsel also contends that additionally Project Manager Ortman misled employees with several statements suggesting there would be no changes in benefits when the Respondents took over, which the General Counsel argues warrants a finding that Respondents are "perfectly clear" successors with a bargaining obligation prior to setting the initial terms and conditions of employment.[13]

The General Counsel also contends in its brief that even if Respondents are not found to be perfectly clear successors under *Burns* or *Spruce Up* prior to October 28, Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees' benefits after a bargaining obligation attached as traditional *Burns* successors. It is contended a bargaining obligation attached to Respondents no later than October 28, and thereafter Respondents were

[13] Respondents assert in their brief the General Counsel made no mention of alleged misleading statements by Ortman in the complaint and argue to do so at the hearing constitutes a denial of due process. However, Respondents concede the General Counsel announced its position concerning the alleged misleading statements in its opening statement, and Respondents have been able to brief the issue. I do not find Respondents late due process claim first appearing in their post-hearing brief to be persuasive. As stated by Respondents, the General Counsel asserted its position at the outset of the trial, and Respondents called witnesses who testified in response to the General Counsel's claim. The General Counsel's position was fully litigated and briefed to me. There was no claim at the trial of prejudice, and if there had been, I could have entertained requests for additional time by Respondents for the gathering of witnesses and evidence. I can only conclude Respondents made no such request because they were fully prepared to present evidence on this issue and a reading of the record reveals they did so. I therefore find no merit to Respondents' due process argument.

required to notify and bargain with the Union concerning any further changes to employee working conditions, including changes not specifically announced prior to Respondents' assumption of operations. The General Counsel argues Respondents violated the act by unilaterally eliminating the predecessors' uniform and shoe allowance and by altering the employee break structure, including the elimination of the 30 minute paid lunch break. It is argued Respondents failed to notify the employees and the Union of their intention to make these changes prior to commencing operations on October 28. I do not find merit to this third theory. First, it was not sufficiently articulated in the complaint, or in the General Counsel's opening statement for Respondent to be apprised of, respond to, or brief the argument. Second, the parties' stipulation, as set forth above, noting in particular paragraphs 15, 17 and 18 appears to undercut the factual premise of the argument. Taken singularly, and together, I reject this argument on due process grounds, noting in particular Respondent did not address such a contention in their brief supports my conclusion to hold otherwise would be inappropriate here.

1. The Respondents are Perfectly Clear Successors Under the Board's *Spruce Up* Rationale

Since the decision to reverse *Spruce Up* is one left to the Board, I am required to determine whether Respondents violated the Act under Board's current guidelines for which *Spruce Up* is the seminal case relating to the "perfectly clear" successor analysis. The Court in *Burns* stated, "A statutory successor is not bound by the substantive terms of the predecessor's collective bargaining agreement and is ordinarily free to set initial terms and conditions of employment. *NLRB v. Burns Services Inc.*, supra at 281-282, 294-295. However, the Court went on to state, "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."

In *Spruce Up Corporation,* supra at 195, the Board majority stated as follows:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him-a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.
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> ***
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> We believe the caveat in *Burns,* therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,[FN7] or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

In *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB,* 595 F.2d 664, 674-676 (D.C. Cir. 1978), the court stated pertaining to the Board's *Spruce Up* decision that:

Even when *Burns* is read, as the Board does, to limit compulsory initial-terms bargaining to situations wherein the successor has indicated that incumbents will be retained and has not concurrently announced downward changes in employment terms, predecessor-employees are afforded an important measure of protection. Once the duty to bargain has thus attached, the successor is obliged to consult the incumbent union before institution of less satisfactory terms. That is significant because unconditional retention-announcements engender expectations, oft times critical to employees, that prevailing employment arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued,[FN48] unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.

The Board was hardly at liberty to ignore these concerns, and its construction of *Burns* is responsive to them. On the one hand, incumbents informed of the availability of employment with the successor entity but contemporaneously notified of substantial changes in the conditions thereof are not lulled into a false sense of security. When, on the other hand, the announcement of job-availability is unaccompanied by any such warning, incumbents may resolve to cast their lot with the successor, secure in the knowledge that they can invoke the aegis of collective bargaining should alterations in the terms of the employment be proposed. [FN49]

FN49. When the employment offer and a subsequent announcement of changed terms both occur prior to actual hiring, the announcement could deter some employees from accepting, notwithstanding that it is made some time after the successor first makes known his plan to retain incumbents. If, for example, the successor indicates that he intends to reemploy his predecessor's workforce a month hence, and when employees arrive to submit applications two weeks later he informs them that substantially different terms will be instituted, some incumbents may decide to look for work elsewhere. Nevertheless, a duty to bargain with respect to the proposed changes could possibly be properly imposed on either of two grounds. For lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and perpetuation of the workforce and as well the representational status of the incumbent union may be assured. Even were that less plain, a bargaining obligation may be essential to protect the employees from imposition resulting from lack of prompt notice. Thus a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits. And such an inference may be left undisturbed by revelation of employment terms after the employer's initial announcement but before actual hiring commences. The successor would have no legitimate complaint about mandatory bargaining in such circumstances because its necessity is a product of his own misleading conduct.

In *Hilton's Environmental, Inc.,* 320 NLRB 437, 438 (1995), the Board in applying the "perfectly clear" caveat articulated in *Burns* as explained in *Spruce Up* stated:

Applying these principles to the facts of this case, we find that the "perfectly clear" caveat is applicable in this case. Thus, as discussed above, the Respondent had solicited applications from the employees on September 8, and had assured them the following day that all would be hired unless some problem arose as a result of information disclosed on their applications or in the interview process. Contrary to the Respondent, there was no clear announcement at this time that it intended to establish new terms and conditions of employment. See *Fremont Ford,* 289 NLRB 1290 (1988) (employer told

union it had doubts about retention of only a few unit employees; employer's stated desire to change seniority and institute a flat rate insufficient to indicate intent to establish new employment conditions).

To the contrary, the Respondent's entire course of dealing with the employees, including accepting the December 1991 letters of intent that stated that the employees would work for the Respondent at the contractual wage rate, and the Army's having advised the Union, prior to the September 8 solicitation of applications, that the Respondent's contract with the Army was subject to the Service Contract Act and that the Son's collective-bargaining agreement would therefore be incorporated into the contract, all indicated that the Respondent did not intend to establish new terms and conditions of employment. See *Canteen Co.*, above; *Weco Cleaning*, above; *Fremont Ford*, above. Accordingly, we find that the Respondent violated Section 8(a)(5) by unilaterally changing existing terms and conditions of employment. [FN10]

In *Canteen Co.,* 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), the new company, prior to assuming control of operations on July 1, 1992, personally contacted the predecessor employees to say it wanted them to apply for employment. It was noted the respondent also had several discussions with the union representing the predecessor's employees in June concerning its desire to establish a new job classification. The parties discussed the sample contract they would use to begin negotiations for a new collective-bargaining agreement. On June 22, the respondent told the union that it wanted the predecessor's employees to serve a probationary period and the union agreed. On that date, the parties agreed to meet on June 30 to negotiate a collective-bargaining agreement. In its discussions with the union, the respondent did not mention anything about making any changes in the initial terms and conditions and the Board, stated:

> We agree with the judge that the Respondent violated Section 8(a)(5) of the Act when, on or after June 23, the Respondent told three of the four predecessor employees that they could continue working the food services operation, but at significantly reduced wages. Specifically, we find that by June 22, when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. Therefore, as it was "perfectly clear" on June 22 that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.
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> Our colleagues in dissent contend that the "perfectly clear" caveat in *Burns*, as interpreted in *Spruce Up*, should apply only when the new employer has failed to announce initial employment terms prior to, or simultaneously with, the extension of *unconditional offers of hire* to the predecessor employees. None of the cases cited in the dissent, including *Burns* and *Spruce Up*, expressly limit the caveat to such a late point in the transition from one employer to another. To the contrary, the judge correctly cited *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977), as a controlling example of the imposition of an obligation to bargain about initial terms of employment prior to the new employer's extension of formal offers of employment to the predecessor's employees.

The facts and the Board's findings in *Hilton Environmental,* supra, and *Canteen Co.,* supra, demonstrate that an actual offer of employment is not required to establish the "perfectly

clear" successor's obligation to bargain.[14] Rather, it has an obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees their employment will be on terms different from those in place with the predecessor employer. See also, *Elf Atochem North America, Inc.,* 339 NLRB 796, 808 (2003); *DuPont Dow Elastomers, LLC,* 332 NLRB 1071, 1073-1074, 1074 fn. 7 (2000), enfd. 296 F.3d 495 (6th Cir. 2002) (perfectly clear successor found where the unions were informed that although the successor employer would not honor the predecessors CBA's it would maintain employees' wages and benefits under those contracts); *Helnick Corp,* 301 NLRB 128, 134 (1991); *Turnbull Enterprises,* 259 NLRB 934, 938-940 (1982); and *CME, Inc.,* 225 NLRB 514 (1976).[15]

Similarly, in *Cadillac Asphalt Paving,* 349 NLRB 6, 10-11 (2007) the Board stated:

> The record clearly establishes that Respondent LLC is a "perfectly clear" successor to Respondent Paving. On July 1, LLC assumed control of Paving's operations. On July 7, LLC President Rickard announced the joint venture in a meeting with Paving's entire work force. After Rickard spoke, MPMC Safety Director Marlene Van Patton asked all the employees to complete job applications and W-4 forms to update LLC's records. The employees, including the drivers, completed and submitted their applications that day. After completing his paper-work, driver Steve Pierce asked LLC General Manager Sandell, who was also present at the meeting, about LLC's 401(k) plan. Sandell responded that LLC did not have a 401(k) plan for hourly employees. Aside from the 401 (k) remark, LLC did not announce any changes to the employees' terms and conditions of employment at this meeting. The following day, July 8, the employees returned to work without any changes in operations or duties.
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> Although not mentioned by the judge in his decision, LLC's hiring process entailed no further measures. Unit driver Pierce testified that LLC did not conduct job interviews. There is no evidence that LLC sought additional applicants from any source other than Paving's work force.
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> As noted above, at no time before or during the July 7 meeting did LLC mention changes to the employees' negotiated wages, benefits, or other terms and conditions of employment. In fact, prior to this meeting, when employee and Teamsters steward Pierce asked LLC agent Fred Aiken about the Respondents' plans for the Teamsters, Aiken assured Pierce that everything would remain the same. As a result, the drivers reasonably assumed that their terms and conditions of employment would remain the same when LLC took over Paving's operations. Nothing said at the July 7 meeting dispelled their assumption.[FN31]

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[14] In enforcing the Board's order in *Canteen,* the court stated, "In this case, Canteen instituted unilateral changes in the initial terms of employment by offering drastically reduced rates of pay to the predecessor's experienced employees without prior negotiation. The employees' refusal to accept employment was found by the ALJ and the Board to be a constructive denial of employment. We agree that Canteen's conduct was "inherently destructive" of the rights of those employees. As a result, *Canteen* had the burden of justifying its actions. See, *Canteen Corp. v. NLRB,* 103 F.3d 1355, 1366 (7th Cir. 1997).

[15] In *C.M.E., Inc.,* at 514-515, the Board held the respondent made it "perfectly clear" that it planned to retain all or substantially all of the employees in the unit as of February 25, and the obligation to bargain, including the setting or altering of initial terms of employment, commenced on that date rather than May 6, when the union subsequently made a formal request for recognition and bargaining.

Thus, by offering job applications and W-4 forms to Paving's employees on July 7, LLC invited the employees to accept employment without announcing its intention to set initial terms and conditions of employment. In these circumstances, we find, in agreement with the judge, that Respondent LLC is a "perfectly clear" successor to Respondent Paving and that Respondent LLC violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Teamsters and by failing to continue the terms and conditions maintained by Paving at the time of succession, i.e., the health and welfare and pension fund contributions in accord with terms of the expired 1998-2003 MRBA labor agreement.[FN32]

FN32. See *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003); *Helnick Corp.*, 301 NLRB 128 fn. 1 (1991). We do not adopt the judge's finding that LLC violated Sec. 8(d), which provides, in relevant part, that "where there is in effect a collective-bargaining contract … no party to such contract shall terminate or modify such contract." Because LLC, as a successor, has no prior agreement with the Teamsters, it could not violate Sec. 8(d) by implementing terms and conditions of employment that varied from the predecessor's collective-bargaining agreement. See *U.S. Generating Co.*, 341 NLRB 1127, 1135(2004).

In the current case, in August 2013, the USDA awarded AEPS a federal contract to provide guard services at the USDA Headquarters facility, which includes the South Building and the Whitten Building, with an effective date of October 28. AEPS director of operations Devers received a copy of the predecessors CBA with the Union as the USDA contract had the CBA attached. AEPS used the CBA to comply with the Service Contract Act (SCA), in lieu of the wage determination. Devers testified he was in contact with the predecessor project manager Ortman as early as August 9. He testified he approached Ortman toward the end of August about Ortman becoming project manager for AEPS. Devers testified Ortman had the title project manager for AEPS as of August 2013, while Ortman continued to also work in that capacity for the predecessor employers. Ortman testified he met Devers and AEPS Owner Walker when they came down for the contract award presentation with USDA. Ortman testified, about a week after they met, he and Devers began to discuss the transition to AEPS. Ortman testified that, at that time, the discussion included Ortman explaining to Devers how the current contract operated. Ortman testified Devers explained this is what we are going to do different from what you are doing now, and they discussed some of the initial terms and conditions of employment AEPS would set. Ortman testified they talked initially about the Paragon and AEPS split and how it would affect the employees who would work for Paragon.

AEPS awarded Paragon a subcontract in August 2013 where Paragon was to provide guard services at the Whitten Building while AEPS was responsible for providing guard services at the South Building. Baker, Paragon's vice president, operations testified 90% of the time Paragon takes over a contract the security officers of the predecessor are represented by a union. Baker testified Paragon uses the predecessor's CBA to comply with the SCA to ensure the jobs they are offering for the new contract meet the requisite wage and hour provisions.

The Union had a CBA in effect with the predecessor contractors covering bargaining unit employees working in both named buildings with an expiration date in September 2014. As federal contractors on a service contract, Respondents were required under Executive Order 13495 and under the SCA, to match wages and fringe benefits of the predecessor employers' CBA, and to offer the predecessors employees a right of first refusal for employment in positions for which they were qualified.[16] Thus, outstanding legal requirements circumscribed permissible

[16] I make no finding whether Respondents complied with the SCA or the Executive Order.

deviations from the employees existing wages and fringe benefits, and Respondents were required to offer the predecessor employees employment for positions for which they were qualified, which in essence was the positions in which they were already working as the record reveals Respondents hired all but one of the incumbent employees, the latter is said to have failed a drug test.

Along these lines, AEPS submitted a "Training Management Plan" to USDA shortly after winning the award for the USDA contract in August 2013. The document states that "Team AEPS intends to carry over the incumbent contractor's guard force from the previous contract in respect to Executive Order 13495, 'Nondisplacement of Qualified Workers under Service Contracts,' the transition training regimen has been simplified for the incumbent staff, and will be more manageable within the transition." Citing Paragon's experience, AEPS went on to state in the plan, "The companies are current in their sense on how to best manage all aspects of this transition for USDA, including the training. Because of this, AEPS foresees no significant difficulties in delivering a trained and qualified guard force by the October 28, 2013 contract start date." Thus, AEPS stated to USDA that AEPS intended to carry over the incumbent guard staff. AEPS statement went further than stating AEPS and Paragon were merely following the Executive Order. Rather, they stated they benefited from doing so by allowing for expedited training of an already experienced qualified staff. The touting of this plan along with expedited training of an experienced staff as a selling point to USDA reveals that neither USDA nor AEPS had problems with the prior staff.

Covington, who was employed as a major for the predecessor employers, was working as a captain for Paragon at the time of his testimony. He testified that, during the transition period, Ortman held a supervisor's meeting and informed the supervisors that some of the SPO's were going to work for Paragon and some for AEPS. He testified they were going to have to make selections on who would work for each company. Union Treasurer and Shop Steward Jones worked for the predecessor employers as a security guard (SPO), and he was employed as such by Paragon at the time of his testimony. Jones' credited testimony reveals that on September 3, he was instructed by his supervisor, along with the co-workers on his shift, to look at the bulletin board to see if their names were listed for Paragon. Jones estimated there were about 10 or 15 names on the memo. Jones testified the instructions on the posted memo were to report to a job fair on September 14. Jones' testimony reveals the supervisor stated if someone's name was not on the list, they would be working for AEPS and would receive information later.

Similarly, Walker, a shop steward, who was hired by AEPS credibly testified that: In mid-September, Walker saw a posting on the officers' bulletin board that Paragon and AEPS would be taking over the USDA contract, and the memo stated the security officers needed to see Ortman in reference to the new contracts to find out which company the employees were assigned to. Walker spoke to Covington, who told Walker to speak with Ortman in reference to her company assignment, and that the officers would probably have to provide their email addresses so they could be sent a link. Covington told Walker it was more than likely she would be working for AEPS since she was currently assigned to the South Building. Around about 2 days later, Ortman called Walker and stated she needed to give the company her email address so they could send her the employment link to apply for employment with AEPS. Ortman told Walker she needed to make sure she had her dates of certification to fully complete the process. Walker gave her email address to her supervisor that evening. Gaines works for AEPS and has served as vice-president of the Union since 2007. Gaines' credited testimony also reveals around the middle or end of September the supervisors asked the officers for an email address to enable AEPS to email a web link to them so they could get into the AEPS system.

Walker's credited testimony reveals that: Following Ortman's solicitation of her email address, Walker received an email from AEPS on September 23. Walker testified there was no substantive writing contained in the email other than a clickable link for her to begin the application process for AEPS. Walker clicked on the email link and it took her directly to the application process. Walker credibly testified the link eventually took Walker to different policies she needed to sign off on. Walker submitted a resume at the time she submitted her application. Walker's credited testimony reveals she completed her online application on September 25. She testified that while she was filling out the application she also completed the federal and state tax forms and the I-9 form. Walker testified that, during that time, she also reviewed: a nondisclosure agreement; a sleeping-on-the-job policy; and a zero tolerance acknowledgment. Walker testified she filled out or reviewed all this information while completing her application on line. Walker testified she had to complete her certification dates for her CPR/first aid, AED, and things of that nature. She testified she also provided direct deposit information while filling out her application. Walker testified that while completing the on line application AEPS did not tell her there would be any change in her working conditions once they took over the contract. Walker received an email confirmation on September 25 from AEPS that they received her application. Walker testified that around 2 days after completing her application, she provided other documents to AEPS personnel including her driver's license and social security card. Similarly, Gaines credibly testified that after she provided a supervisor with her email address, Gaines received an email from AEPS with the link to allow her to apply for employment. When she followed the link it enabled Gaines to complete "All the stuff that you would fill out for employment. We had banking information was in there, W-4s was in there, harassments, that kind of -- everything that you would fill out." Gaines testified there were policies and a handbook policy there.[17] Gaines testified she had to acknowledge the policies on line by checking off on them. Gaines testified everything was done online. Gaines testified she completed the application within a couple of days after she received the email link. Gaines testified that, after she completed the application, she never used the link again to go back on line and complete any other information.

Walker's online AEPS application was submitted under the name of Fitzgerald and is dated September 25. The application was entered into evidence as a generic application for all AEPS applicants and it contains the following statements under item 12, which are in essence repeated just above the online signature line for the application:

> Furthermore, I understand and agree that my employment is for no definite period and may, regardless of the date of payment of my wages or salary, be terminated at any time without any previous notice and without any requirement of cause.
>
> * * *
>
> I further understand and agree that no employee or official of the company has any authority to alter the terms of my at-will employment through oral statements or promises. In order to be binding on the Company, and any agreement that or promise that alters this

[17] There appears to be a clickable link to the AEPS Employee Handbook as part of the application materials to which Gaines and Walker testified as it is included as one of the policies the employees' had to click off on. The handbook placed in evidence is 57 pages. There is a heading in the index for dress and personal appearance. It states at page 44 of the handbook that the company will furnish uniforms as required by the contract and if the uniform is of wash and wear materials, the employee will be responsible for cleaning and maintaining the uniforms. There is no reference to the company provision of shoes under this heading. There is no claim that the AEPS applicants received a hard copy of this handbook.

policy must be in writing and signed by the President of the company.

The application also states, "this application for employment is not a contract of employment and in no way constitutes a commitment by the Company to hire any applicant for employment."

Concerning, Paragon, Jones identified two other memos containing the name "Paragon Systems." It states in the first memo that Paragon would be holding a "Job Fair" on September 14, and in the second memo that Paragon would be holding a job fair on September 29. Jones testified these memos were distributed at work, and were additional memos to the one he had previously seen posted on September 3. Jones testified that he had to complete a job application on line prior to attending the Paragon job fair announced in the referenced memos. Jones testified the requirement of completing an application online was presented to the officers by the supervisors, and from the job fair announcement memos. The memo announcing the September 14 Paragon job fair stated it would take place at the Greenbelt Marriott, and gave time frames for the guard's arrivals based on an alphabetized listing of their last name. The memo stated "Paragon Systems is currently accepting applications from incumbent Security Officers only. To be considered for employment, incumbents MUST complete all parts of the Paragon application process no later than 24 hours before the job fair." The memo directed applicants to two websites as to where to complete an online application. The memo stated the applicants must bring an original and copy of the following documents to the job fair: driver's licenses or state ID; social security card; birth certificate, passport or naturalization; high school diploma, transcript or GED certificate; DD-214, if applicable; void check or bank letter signed by a bank representative. The memo stated, "Offers of employment are contingent upon successfully passing all pre-employment requirements, attending all scheduled training and passing all contract-required performance standards. A medical exam and a drug screen are also required.

Jones applied online to Paragon as directed in the described memos. Jones testified that when he filled out the application there was nothing that indicated his terms of employment that existed at USEC would change with Paragon. Jones testified the only thing it said was they would be "at will" employees. Jones testified the on line application did not mention anything about the following: shoe allowance, training pay, a change in how they would receive their health and welfare benefit, break structure, or threshold for full-time employment. However, the signature page of the Paragon's sample application submitted into evidence contains the following:

> If hired, I agree and understand that I will conform with the policies, practices and procedures of Paragon. I further agree that my employment is "at-will." This means that either Paragon or I may terminate the employment relationship at any time, with or without notice, and with or without cause. I understand that Paragon retains the right to establish compensation, benefits and working conditions for all of its employees. Accordingly, I understand and agree that Paragon retains the sole right to modify my compensation and benefits, position, duties, and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate. No employee or representative of Paragon, other than the President of Paragon, Inc. has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing.
>
> I acknowledge that I have been given the opportunity to ask questions regarding Paragon's policies and procedures, and my potential status as an employee "at-will," and no Paragon representative has promised or implied to me that if I am hired, I will be employed under any terms other that stated above. I agree that this constitutes an

integrated, binding agreement with respect to the "at-will" nature of my employment relationship."

I find Respondents are "perfectly clear" successors under the Board's *Spruce Up* requirements in that they announced their intention to retain the predecessor employees and invited them to accept employment while failing at the same time to announce their intention to change their terms and conditions of employment. See, *Cadillac Asphalt Paving,* 349 NLRB 6, 10-11 (2007); *Elf Atochem North America, Inc.,* 339 NLRB 796, 808 (2003); *Elastomers, LLC,* 332 NLRB 1071, 1073-1074, 1074 fn. 7 (2000), enfd. 296 F.3d 495 (6th Cir. 2002); *Hilton's Environmental, Inc.,* 320 NLRB 437, 438 (1995); *Canteen Co.,* 317 NLRB 1052-1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997); *Helnick Corp,* 301 NLRB 128, 134 (1991); *Turnbull Enterprises,* 259 NLRB 934, 938-940 (1982); and *CME, Inc.,* 225 NLRB 514 (1976). The General Counsel maintains in its brief that AEPS became a perfectly clear successor under *Spruce Up* no earlier than the date on which it distributed the memo for employees to see Ortman concerning which company they would be working for, and no later than the date on which the employees completed their AEPS application. Similarly, the General Counsel argues that Paragon became a perfectly clear successor by failing to announce its intention to establish new terms and conditions of employment prior to or contemporaneously with the issuance of its job fair and application announcement. I find the General Counsel has been persuasive with these contentions.

In this regard, in August AEPS announced its intent to USDA to employ the prior experienced work force with the idea of streamlining training as a means of meeting the October 28 contract startup date. AEPS referenced Paragon as part of its plan to timely start the contract clearly establishing that Respondents intended to hire the predecessors' employees. Soon thereafter, AEPS contacted the Ortman, the predecessors' project manager and enlisted him as the point person for the contract transition and then employed him as AEPS project manager for the USDA site sometime in August. Ortman informed then Major Covington that he would also be retained, and Covington was eventually employed by Paragon. They met with the existing supervisors and divided up which of the predecessors' employees would be working for AEPS, which was to be the majority employer concerning the bargaining unit; and which were to work for Paragon. On September 3, a memo was posted at the jobsite announcing a job fair and stating which employees were to apply to Paragon. Jones, a predecessor employee and a union official, credibly testified the employees on his shift were directed to the memo; and the ones not listed were told that they would be hearing from AEPS with instructions as to how to apply to that employer. Thus, the announcement of Paragon's recruiting efforts was made to all future employees of Paragon and of AEPS signaling the Respondents had plans to hire all of the predecessors employees and had gone so far as to pick which employer would hire which employees. Shortly, thereafter, Paragon posted and distributed its September 14 job fair memos inviting designated employees to attend the off worksite September 14 job fair, telling them to fill out an online application, prior to attending, and that it was necessary to bring an original and copy of the following documents to the job fair: driver's licenses or state ID; social security card; birth certificate, passport or naturalization; high school diploma, transcript or GED certificate; DD-214, if applicable; void check or bank letter signed by a bank representative. These are the type of documents customarily presented to an employer for new employees. Paragon's job fair announcements, along with the directive of which employees were to apply; constituted an invitation for employment; with no concomitant announcement that there would be a change i.e., a reduction in benefits. Thus, employees had to make a commitment in travel and time in traveling to the job fair, locating and copying employment documents, as well as locating and filling out an online application without being told Paragon's offer included a reduction in benefits. Paragon official Baker also identified a second Paragon job fair memo for a job fair to

be held on September 29, with similar announced requirements concerning the need to fill out an application; and bring the described employment related documents. Therefore, employees attending the second job fair would have only received a later announcement in terms of Paragon's offer letter about Paragon's intent to change benefits, and likely would have read Paragon's application at a later date then those attending the initial job fair.

Thus, although Paragon had received the predecessor's CBA in August as part of the award process to allow it to meet its SCA requirements for the predecessor's employees those employees were solicited to attend a job fair in early September by Paragon, but were not informed until September 14; and/or September 29 that Paragon intended to alter benefits to their disadvantage. See, *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB,* 595 F.2d 664, 674-675 fn. 49 (D.C. Cir. 1978), where the court stated "Even when *Burns* is read, as the Board does, to limit compulsory initial-terms bargaining to situations wherein the successor has indicated that incumbents will be retained and has not concurrently announced downward changes in employment terms, predecessor-employees are afforded an important measure of protection. Once the duty to bargain has thus attached, the successor is obliged to consult the incumbent union before institution of less satisfactory terms. That is significant because unconditional retention-announcements engender expectations, oft times critical to employees, that prevailing employment arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued,[FN48] unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force." There the court noted that even when the employment offer and subsequent announcement of changed terms both occur before the actual hiring, a duty to bargain with respect to the proposed changes could possibly be imposed on either of two grounds; for lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and even were that less plain, a bargaining obligation may be essential to protect the employees from imposition resulting from lack of prompt notice. "Thus a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits. And such an inference may be left undisturbed by revelation of employment terms after the employer's initial announcement but before actual hiring commences. The successor would have no legitimate complaint about mandatory bargaining in such circumstances because its necessity is a product of his own misleading conduct."

I find the then prospective employees of AEPS were similarly disadvantaged by Respondents' conduct. First, as early as September 3, these employees were informed that certain employees had been designated to work for Paragon; and that the remainder employees would be contacted by AEPS with instructions on how to apply. Similarly, Walker's testimony reveals that in mid-September a memo was posted stating the security officers needed to see Ortman to find out which company the employees were assigned to. Walker spoke to Covington, who told her to speak with Ortman in reference to her company assignment, and that it was more than likely that she would be working for AEPS since she was currently assigned to the South Building. Around about 2 days later, Ortman called Walker and stated she needed to give the company her email address so they could send her the employment link to apply for employment with AEPS. Ortman told Walker she needed to make sure she had her dates of certification so she could fully complete the process. Walker gave her email address to her supervisor that evening. Similarly, Gaines' credited testimony reveals that around the middle or end of September the supervisors asked the officers for an email address to enable AEPS to email a web link to them so they could get into the AEPS system. Both Walker and Gaines testified that

after providing their email addresses, they were sent emails by AEPS with clickable links to an online application. The totality of Paragon and AEPS conduct here could only be viewed by the AEPS prospective employees as an invitation to employment.

I also find that while, as set forth above, Respondents bargaining obligation accrued when they solicited the predecessor employees to apply, that under Board law statements in the Respondents' respective employment applications that they would be hired as at will employees concerning AEPS; and the additional statements in Paragon's application wherein it reserved unto itself the right to change benefits, but did not state it would do so, or list any specific benefit changes also amounted to a failure to give the applicants sufficient information to alter Respondents status as perfectly clear successors.[18] See, *Windsor Convalescent Center of North Long Beach,* 351 NLRB 975, 980-981 (2007), enf. denied in relevant part, 570 F.3d 354 (D.C. Cir. 2009),[19] where the Board majority found that even assuming the respondent informed applicants that they would only be employed on a temporary basis, that as a result they were not eligible for certain benefits, and that other terms and conditions would be set forth in personnel policies in a subsequently issued handbook the Board found the respondent was nevertheless a perfectly clear successor because the respondent failed announce its intent to establish a new set of conditions prior to inviting the employees to accept employment. In *Windsor Convalescent Center of North Long Beach,* at 981, the Board majority stated, "there is no evidence that the Respondent, prior to the takeover, informed Candlewood employees that those who were retained would be working under different core terms and conditions of employment. On this record, we find that the Respondent 'failed to clearly announce its intent to establish a new set of conditions prior to inviting former [Candlewood] employees to accept employment.'" See also, *Canteen Co.,* 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), where the Board found an employer to be a perfectly clear successor, although it had informed the union that it wanted the predecessor's employees to serve a probationary period. It is commonly known that employees serving a probationary period are considered to be akin to employees at will during that period.

The court in *S & F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354, 359-362 (D.C. Cir. 2009),[20] in reversing the Board in *Windsor Convalescent*, supra and concluding that the respondent employer was not a perfectly clear successor, stated as follows:

[18] I make this finding only should a reviewing authority disagree with my prior analysis, because I have previously found that Respondents bargaining obligation affixed when it solicited the employees to apply, and for the reasons stated subsequent conduct would not alter that obligation.

[19] The Board majority *Paragon Systems, Inc.,* 362 NLRB No. 166 slip op. at 3 fns. 6, 7 (2015), distinguished but did not overrule *Windsor Convalescent Center of North Long Beach,* supra. In *Paragon,* supra, the Board pointed out that in *Windsor* the Board had found the respondent to be a "perfectly clear" successor, which as pointed out by the ALJ in *Paragon* was not being alleged against Paragon in that litigation. See, *Paragon* at pages 6 to 7. Since the General Counsel has taken the position that Paragon and AEPS are perfectly clear successors in the current case a separate set of issues and parameters are raised here.

[20] While the court in *S & F Market Street Healthcare LLC* reversed the Board's perfectly clear successor finding in *Windsor Convalescent Center of North Long Beach,* and in doing so disagreed with the Board's "core terms and conditions" requirement, I am constrained to follow Board precedent, not reversed by the Supreme Court. See, *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984).

On the undisputed facts of this case, no employee could have failed to understand that significant changes were afoot. The cover letter attached to each job application foretold "significant operational changes," identified various pre-employment checks and tests to be passed, and explained that any employment offered would be both temporary and at will. The Board discounted the cover letter on the ground that it "lacked any mention of intended changes to employees' terms and conditions of employment." *Id.* at 981. Yet under Candlewood's collective-bargaining agreements with the Union, as any employee would know, each employee with 90 days on the job had vested "seniority rights" and could not be terminated except for cause, which the Union could contest through the negotiated grievance and arbitration procedure. By announcing that any employment with S & F would be at will, therefore, S & F was announcing a very significant change in the terms and conditions of employment-both for those who had been employed by Candlewood for 90 days or more and for those who expected to be. In addition, by requiring its new employees to agree to its own alternative dispute resolution policy, S & F made it clear the grievance mechanism the Union had negotiated with Candlewood would not be available.

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Nevertheless, the Board concluded "there is no evidence that [S & F], prior to the takeover, informed Candlewood employees that those who were retained would be working under different core terms and conditions of employment." 351 N.L.R.B. at 981. We see two errors of law in this restatement of the "perfectly clear" standard.

First, the focus upon "core" terms and conditions misstates the rule, which is that the successor employer must simply convey its intention to set its own terms and conditions rather than adopt those of the previous employer. Granting that a trivial change in employment conditions may not suffice, there is no requirement in *Burns* or *Spruce Up* that the intended change(s) involve "core" terms. Whatever that term may mean, however, it surely includes instituting at-will employment and eliminating the negotiated grievance and arbitration procedure.

Second, the Board's holding achieves precisely what *Burns* and *Spruce Up* sought to avoid. In those cases the Supreme Court and the Board respectively started from the presumption that a successor employer may set its own terms and conditions of employment and reserved the "perfectly clear" exception for cases in which employees had been misled into believing their terms and conditions would continue unchanged. *See Burns,* 406 U.S. at 294-95, 92 S.Ct. 1571; *Spruce Up,* 209 N.L.R.B. at 19. In this case, the Board presumed the predecessor's terms and conditions must remain in effect unless the successor employer specifically announces it will change "core" terms and conditions. Thus does the exception in *Burns* swallow the rule in *Burns.* Under the proper standard, S & F clearly comes within the protection of the rule rather than the straightjacket of the exception: It was never "perfectly clear that the new employer plan[ned] to retain all of the employees in the unit," *Burns,* 406 U.S. at 294-95, 92 S.Ct. 1571, let alone that it did so "with no notice that they would be expected to work under new and different terms," *Spruce Up,* 209 N.L.R.B. at 195 n. 7. On the contrary, the Company announced it would retain only those who met certain preemployment tests and stated its intent to set new initial terms and conditions of employment.

Since I find that AEPS and Paragon's bargaining obligation with the Union attached at the time they each solicited the predecessor employees to apply; which predate the time of the employees' actual applications and any statements contained therein, this case is distinguishable from the court's decision in *S & F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354 (D.C. Cir. 2009). However, this case is also distinguishable from *S & F Market* in other significant ways. There, as reported by the court, the respondent employer purchased the predecessor,

and prior to assuming control concluded it would need to increase the level of care and replace the staff. It then decided closer to its July 1 takeover that it could not replace the entire staff because doing so would be too disruptive to the residents. Rather, it decided to hire some of the predecessor's employees for up to 90 days, while it continued to recruit new employees. When in June it had applications distributed to existing staff it included a cover sheet stating that it intended to implement significant operational changes and current employees must submit the attached application for employment. It advised that only employees who meet the company's operational needs will be interviewed and any offer of employment will be contingent on your passing a pre-employment physical, drug test and acceptable reference and background checks. The court noted the job application itself required the applicant to affirm their understanding that passing the tests and checks was a condition of employment, that any employment would be at will, and that S & F could change benefits, policies at any time. During subsequent interviews at the end of June, each employee who submitted an application was interviewed; and each applicant was informed their employment would be temporary and would last no more than 90 days. The employees who were accepted were sent a letter dated June 30, stating it was an offer of temporary employment; that as a temporary employee they were not eligible for company benefits, and that other terms of your employment will be set forth in the respondents' personnel policies and its employee handbook. It stated their employment was at will and would end no later than the expiration of the 90 day period, unless they were selected for regular employment. Those hired also had to sign an agreement to be bound by an alternative dispute resolution policy. Within the first 3 months of operation the successor had replaced a majority of those hired from the predecessor's staff with new employees.

In the current case it was the Respondents intent to retain the predecessor employees, acknowledging their skill and training, and AEPS so informed USDA of such in August, before it had any contact with those employees. Moreover, Respondents were required to offer employment to those employees under the existing executive order. There is no claim that this was done on a temporary basis, or that the employees were informed of such. In fact, seniority lists submitted at the hearing in February 2015, reveal that prior incumbent employees hired by Paragon in October 2013 still constituted 16 of 17 of Paragon's unit employees. Moreover, Paragon retained incumbent employees on the seniority list using the seniority dates the employees began working for a USDA contractor, rather than the October 2013 date they began working for Paragon. All but one of those dates, were 2010 or earlier, dating as far back as 1996. Additionally, the employees here were used to meeting certification and testing requirements when there was a change in contractors, so those requirements mentioned by Paragon in its September posting to attend its job fairs would not have signified to the incumbent employees that Respondents were going to change their working conditions. Rather, Respondents were following the same pattern of the predecessor employers, for which these employees were accustomed and had survived in the prior transition period between contractors. Devers testified the employees of the predecessor were required to maintain most of the requisite qualifications for employment with the predecessor employers, and he did not believe there was a requirement change for AEPS in this instance other than in the nature of type of drug testing. Thus, there was little change in their existing requirements for the incumbent employees to transition to the Respondents. In fact, only one of the predecessors' employees who applied to Respondents failed to meet the testing requirements. This point is somewhat conceded by Respondents in their brief because they contend they did not offer the incumbent PSOs employment until Respondents gave them their offer letters. However, those offer letters were contingent on the enumerated testing requirements. Thus, unlike *S & F Market,* I have concluded based on the cases cited and for the reasons mentioned that Respondents bargaining obligation with the Union attached when Respondents solicited the predecessor employees to apply, which predated their applications. Moreover, I find the terms set forth in the applications

when subsequently reviewed did not signal to these employees that Respondents intended to change their wages, hours, and benefits.

The court noted in *S & F Market* that the Board did not explain its "core terms and conditions of employment" reference in *Windsor Convalescent Center* and for the reasons stated by the court drew a different result than that reached by the Board. While I cannot speak for the Board, I note that in *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 198-201 (1991), the Court held that a post contract layoff dispute not arising under the terms of the contract was not arbitrable, under the expired arbitration clause. In this regard, the Court stated that:

> The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. See *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). In *Katz* the union was newly certified and the parties had yet to reach an initial agreement. The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed. See, *e.g., Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544, n. 6, 108 S.Ct. 830, 833, n. 6, 98 L.Ed.2d 936 (1988).
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> Numerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA. See generally 1 C. Morris, The Developing Labor Law 772–844 (2d ed. 1983).
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> In *Hilton–Davis Chemical Co.,* 185 N.L.R.B. 241 (1970), the Board determined that arbitration clauses are excluded from the prohibition on unilateral changes, reasoning that the commitment to arbitrate is a "voluntary surrender of the right of final decision which Congress ... reserved to [the] parties.... [A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." *Id.,* at 242. The Board further relied upon our statements acknowledging the basic federal labor policy that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). See also 29 U.S.C. § 173(d) (phrased in terms of parties' agreed-upon method of dispute resolution under an *existing* bargaining agreement). Since *Hilton–Davis,* the Board has adhered to the view that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz,* continue in effect after expiration of a collective-bargaining agreement.
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> We think the Board's decision in *Hilton–Davis Chemical Co.* is both rational and consistent with the Act. The rule is grounded in the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration. See *Indiana & Michigan, supra,* at 57–58; *Hilton–Davis Chemical Co., supra.* The rule conforms with our statement that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974). We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.

In *Finley Hospital*, 359 NLRB No. 9, slip op. at 2-3 (2012), the Board majority stated:

> The declared policy of the Act, as stated in Section 1, is to "encourage [e] the practice and procedure of collective bargaining" and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Because it is critically important that collective bargaining be meaningful, it has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). Under this rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' existing agreement has expired and negotiations have yet to result in a subsequent agreement, as in this case. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In the latter circumstances, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. Id . at 198-199.

The Supreme Court's decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), rendered the Board's decision in *Finley Hospital*, 359 NLRB No. 9, slip op. at 2-3 (2012) invalid. However, in *Finley Hospital,* 362 NLRB No. 102 (2015), a Board majority subsequently affirmed the ruling finding an unlawful unilateral change concerning the discontinuance of a contractually established wage increase following the expiration of the collective-bargaining agreement. The Board stated, "even without a contractual obligation, the employer still has a duty to bargain under Section 8(a)(5). That duty requires that the employer not make changes to existing terms and conditions of employment without satisfying its statutory bargaining obligation. Changes may be made if the employer notifies the union and bargains new terms--or if the parties bargain and reach a lawful impasse. See, e.g., *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036-1038 fn. 6 (2003), review denied 381 F.3d 767 (8th Cir. 2004). When the employer ignores its statutory duty to bargain and makes changes unilaterally, it is bypassing the union and depriving its employees of their right to be represented in bargaining over their terms and conditions of employment."

As noted from the above discourse, unless certain circumstances exist from an expired CBA, or the dispute arose under the prior contract, arbitration does not survive the expired CBA during contractual hiatus periods. Ergo discipline taking place following the expiration of a CBA would not ordinarily be arbitrable, bringing that type of discipline more akin to termination at will; and differentiating it from the core conditions of employment such as wages, hours, and fringe benefits for which it is commonly known must be bargained to impasse with a newly certified union or following the expiration of a CBA before an employer can make changes to those aspects of employees working conditions. Given this differentiation by the Court and the Board, the average employee might not so readily conclude that a successor employer by merely stating their employment would be at will standing alone would signify to that employee that the successor employer was planning to make changes to their wages, hours or working conditions when they were hired.[21] In fact, to accept such a stance would allow every "perfectly clear"

[21] Of course, it is even an open question as to whether an employer with an obligation to recognize and bargain with a union, even absent a collective-bargaining agreement, could terminate an employee "at will" that is without prior consultation with the employee's collective-

successor to eviscerate its bargaining obligation set forth by the Court in *Burns* by the use of two words, "at will." The Board in *Sahara Las Vegas Corp.*, 284 NLRB 337, 343 (1987), enfd. 886 F.2d 1320 (9th Cir. 1989), rejected a similar attempt by a successor employer when it attempted to label the predecessor workforce it hired as probationary employees in an effort to delay its bargaining obligation. There, the ALJ stated, with Board approval, that:

> the Respondent has shown no special circumstances here warranting the postponement of that obligation. The probationary period imposed by the Respondent comes across on this record as little other than a meaningless device having no discernible impact on employee tenure or the Respondent's staffing plans which, for all that's shown here, were complete as of August 20. For this reason, I am at a complete loss to comprehend what policy under the Act would be served to accord the sweeping effect the Respondent desires here to the probationary period. Indeed, the Respondent's argument on this point is so lacking in merit when weighed against the existing case law that I am compelled to look elsewhere for an explanation of its refusal to adhere to its legal obligations. That explanation is, in my judgment, fully explained in Lewis' testimony, noted above, the essence of which is that the Respondent intended to retain complete unilateral control over its casino employees consistent with the historical pattern of this industry in Las Vegas.

While the Respondents here labeled the employees as "at will" in their employment applications, I find from the beginning they informed the USDA that it intended to hire these skilled and trained employees, did hire them, and as the record shows retained the vast majority of them up until the time of the trial. I find that the use of "at will" and similar terminology in Respondents' employment applications as was the case in *Sahara Las Vegas Corp,* would be little more than a device to enable sophisticated employers to terminate their initial bargaining obligation as "perfectly clear" successor employers, as had been Respondents' practice when they had taken over other prior government contracts.[22]

Moreover, the Court stated in *NLRB v. Burns Services Inc.*, 406 US 272, 280, 281 (1972), that "It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed." However, the Court went on to state, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." The reduction in wages and benefits was impliedly viewed differently by the Court then the requirement that a successor be strictly bound by the predecessor's CBA, or the grievance-arbitration procedure contained therein. See also, *DuPont Dow Elastomers, LLC,* 332 NLRB 1071, 1073-1074, 1074 fn. 7 (2000), enfd. 296 F.3d 495 (6th Cir. 2002), where a perfectly clear successor was found where the unions there were informed that although the successor employer would not honor the predecessors CBA's it would maintain employees' wages and benefits under those contracts. In *Bellingham Frozen Foods,*

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bargaining representative. See, *Alan Richey, Inc.,* 359 NLRB No. 40 (2012), rendered invalid by the Court's decision in *NLRB v. Noel Canning,* 134 S.C. 2550 (2014).

[22] For example, Paragon's reference in its employment application that "No employee or representative of Paragon, other than the President of Paragon, Inc. has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing," can be construed as a response to offset a possible fact pattern as set forth by the court in *S & F Market Street Healthcare LLC v. NLRB, supra.,* where there were alleged statements by supervisors offsetting the successor employer's employment related documents.

Inc., 626 F.2d 674, 678-679, fn.1 (9th Cir. 1980), the court stated "When it is 'perfectly clear' that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain commences immediately." However, citing *Burns,* the court stated the obligation is to recognize and bargain with the union, but it is not bound to the substantive terms of the predecessor's CBA not agreed to or assumed by it. Similarly, in *Cadillac Asphalt Paving,* 349 NLRB 6, 10-11 fn. 32 (2007), the Board found the respondent was a perfectly clear successor that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union and by failing to continue the terms and conditions maintained by the predecessor at the time of succession, i.e., the health and welfare and pension fund contributions in accord with terms of the expired 1998-2003 MRBA labor agreement, but that the respondent did not violate Section 8(d) of the Act by implementing terms and conditions of employment that varied from the predecessor's collective-bargaining agreement. In this regard, the Board has found a successor employer to be a perfectly clear successor, although it had informed the union there that it wanted the predecessor's employees to serve a probationary period. See, *Canteen Co.,* supra. Thus, it would not seem informing employees their employment would be at will would necessarily constitute a signal to those employees that an employer intended to change their wages, hours, and fringe benefits.

While I find AEPS and Paragon's bargaining obligation with the Union attached at the time they each solicited the predecessor employees to apply; which predates the time of the employees' actual applications, I also find the applications themselves further confirmed the Respondents intent to hire and did not specifically apprise the employees that there would be a change or reduction in wages or benefits. In reaching this conclusion, I have considered the fact that the AEPS application stated the applicants employment would be "at-will" as did the Paragon application which went even further by stating that Paragon retains the right to establish compensation, benefits and working conditions for all of its employees; and the right to modify my compensation and benefits, position, duties, and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate. It also stated that "No employee or representative of Paragon, other than the President of Paragon, Inc. has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing." While the Paragon application stated that Paragon retained the right to establish compensation and benefits, it did not state Paragon planned to exercise that right, nor apprise employees of what changes, if any, Paragon intended to make.[23]

[23] While in *Paragon Systems, Inc.,* 362 NLRB No. 166 (2015), the Board majority accepted language similar to the language in the Paragon's application there are differences here. First, *Paragon Systems, Inc.,* did not involve the issue of whether Paragon was a perfectly clear successor, as is raised in the current case. Moreover, the majority of the employees here were AEPS applicants, and their applications mentioned nothing but the at will terminology. Moreover, although I have found Respondents perfectly clear successor status was perfected prior to the predecessor employees receiving their offer letters, the AEP October 17 offer letters stated, "Shift schedules will be determined in accordance with the operation need of the contract with consideration given to employee seniority. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements and subject to the operational needs of the contract." While, some may say the employees should have been be able to predict in advance from this ambiguous language that Respondents were going to cease paying the employees for their theretofore compensated 30 minute lunch break as the Board majority found with respect to guard mount breaks in *Paragon Systems,* the facts are different here because not all of Respondents' supervisory staff had same ability to divine such a policy change. In this regard, Walker's payroll records and her testimony reveal that she

In this regard, Walker testified that while completing the on line application AEPS did not tell her that there would be any change in her working conditions once they took over the contract. She testified there was nothing in the application suggesting there would be a change to the following: how she received her health and welfare; changing the rate of training pay; the threshold for determining full-time status; a change to the uniform allowance; a change to the shoe allowance; a change in how frequently she would be paid; or a change in lunch breaks. Similarly, Jones testified he applied online to Paragon and that when he filled out the application there was nothing that indicated his terms of employment that existed at USEC would change with Paragon. Jones testified that the only thing it said was that they would be "at will" employees. Thus, neither Walker nor Jones, who had both been long term contractor employees at the USDA and who were active union stewards equated the "at will" reference in the employment applications with an announcement that the Respondent's intended to alter the benefits used by the predecessor.

Walker and Jones testimony is supported by the fact, that there is no claim by either the employees or the Respondents' witnesses that the "at will" reference drew any questions by any employees to Respondent's officials. Yet, when the same employees received the Respondents' offer letters which directly reflected there would be changes in specified benefits, this prompted Jones, Walker, and Gaines to confront Ortman about those changes. Moreover, there was testimony that employees raised questions with Respondents officials about these changes during the orientation meetings held by Respondents. There is no contention that any questions were ever raised at these meetings or at any time about Respondents employment application statements that they would be hired as "at will" employees. This serves to buttress my conclusion in crediting Walker and Jones that they did not view Respondents "at will" notification as a prelude to there being a change in wages, hours, and benefits. If they did, their conduct in general suggests they would have raised questions about it. It seems that it may help to look to how reasonable employees perceived and reacted to information, as a guide to how information would actually be viewed by reasonable employees.

The record reveals that during its September 14 and 29 job fairs Paragon passed out of letters to incumbent employees stating employees were being extended a contingent offer of employment with an effective date of October 28. There was an appendix attached setting forth base pay and other benefits. It stated the employee would be offered the company's sponsored health/dental benefits under the terms of the company's plan. It stated if the employee chose not to receive health and medical coverage, the health and welfare hourly rate indicated in the appendix would automatically be contributed into a company sponsored 401(k) retirement plan, pre-tax, for their benefit. It stated, "You will not have the option of receiving a cash payment in lieu of health and retirement benefits." The letter stated, "Shift schedules will be determined in accordance with the operational needs of the contract. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements

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continued to be paid for her 30 minute lunch break for a period of time after she started working for AEPS, actually through the end of November, as did Jones testimony reveal that he had been paid for a period of time while working for Paragon. While Covington testified to the contrary to Jones claim on this point, these payroll records were in Respondent's control and they chose not to introduce them. Thus, the Board has more information here that not only did the employees credibly testify that they did not expect benefit changes from Respondent's statements, Respondents actions in continuing to pay some of the employees for these breaks reveal some of its supervisory staff drew the same conclusions as did the employees.

and subject to the operational needs of the contract." The letter stated that Paragon considers a full time employee one who works an average of 40 hours per week. It stated employment is contingent on successfully passing all pre-employment requirements, with certain requirements listed. It was stated that employment would be at will, with a description of what that meant. It stated that in compliance with Executive Order 13495, "you are hereby given a first right of refusal for this job opening." It stated the offer of employment must be accepted by October 1.

Similarly, AEPS applicants were emailed a contingent offer letter on October 17. Their offer letter was signed by Ortman. The offer included the employee's hourly wage and fringe benefit rate, and stated the fringe benefit will be directed towards a company sponsored medical plan, or under certain circumstances, towards a company-sponsored 401(k) account, pre-tax. It mentions other benefits in terms of holidays, and vacation. The email states, "Shift schedules will be determined in accordance with the operational needs of the contract, with consideration given to employee seniority. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements and subject to the operation needs of the contract." The email states, "Training will be paid at a rate of $8.25 an hour." The email states employment is at will, which included the employer's right to terminate the employee without notice or cause. The email stated pursuant to Executive Order 13495, the employee was being given a first right of refusal for this job opening. The email stated, "If you intend to accept employment with AEPS, please print this letter, sign it, and give the signed letter to Ortman, the project manager by October 28.

When Walker received the October 17 offer she went to speak with Ortman and told him she had some concerns regarding the letter in reference to health and welfare issues and the rate for training pay. Ortman responded that he was on the phone speaking the company concerning health and welfare. Walker told Ortman, "if they're going to take our health and welfare, that I'm not going to be signing this letter." Walker testified Ortman responded this was a general letter they received for employment and not to worry about it. Ortman stated in reference to the Union that as long as they do their part he will do his part in reference to that in that he would be talking to the company about it. Walker testified upon Ortman's "reassurance that this was basically a general offer letter and that he also stated that he didn't think so, as far as them taking our health and welfare and things of that nature, I signed the letter." Similarly, Gaines testified when she received her offer letter, she called Ortman and stated the offer letter specified a change in training pay, and they were going to take the employees' health and welfare. Gaines testified, "He said don't worry about it, it's a general letter, go ahead and sign it, everything will be okay." Gaines testified after she spoke to Ortman she signed the offer letter. Jones received his Paragon offer letter at the September 14 job fair. He testified that following the job fair on September 14, he called Ortman and told him what the offer letter said. Jones testified Ortman stated "American Eagle was the prime and that nothing was going to change, everything was going to stay structurally the same, and not to worry about it." Jones testified he told Ortman about the offer letter "because it was a grave concern of a lot of officers." Jones testified he told Ortman about Paragon taking their health and welfare stating that was the main concern. Jones testified Ortman said Paragon is the subprime and AEPS is the prime, and they have to do what AEPS does.

Ortman denied these conversations but testified he met with all of the AEPS applicants on an individual basis and claimed that not one of them had a question about their offer letter, which contained changes to their prior employment conditions. I found Ortman's testimony to be not credible, and have credited the testimony of Walker, Gaines, and Jones as to their conversations with Ortman. I note that Jones testified he raised the offer letter

to Ortman because the announced changes in health and welfare were of concern to a lot of officers. I have concluded that Ortman could predict that these three union officials would have discussed his response with other officers; and that in fact it is likely Ortman gave similar responses to officers in his one on one meetings with employees. See, *Fremont Ford,* 289 NLRB 1290, 1296 (1988), when the Board took into account a misinformation campaign by the respondent's supervisors to employees as to what to expect concerning working conditions when the respondent took control in concluding the respondent there failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Jones attended a mandatory new hire orientation conducted by Paragon on October 19, at which time the Paragon employee handbook was distributed. During the meeting, in response to a question, the employees were told they had to wear company issued boots unless it was okayed by the government. Jones testified that, after the presentation was complete, the officers were told they could go to the parking lot and get their uniforms. The Paragon Handbook is 54 pages, and largely single spaced. There is no heading in the index relating to uniforms, although there is a section in the handbook at pages 24 to 26 under the heading "UNIFORMS AND APPEARANCE", which states that "You will be issued either 'wash-and-were' or 'dry clean-only' uniforms, at no cost to you." It later states, "If you are issued a uniform that requires dry cleaning, the local contract office will make arrangements to either provide clean uniforms to you, or reimburse you for dry cleaning expenses." As to AEPS employees they only had the opportunity to view their company handbook on line when they filled out their applications at the end of September. They did not receive their uniforms until about a month later. The handbook states at page 44 of 57 pages that the company will furnish uniforms as required by the contract and if the uniform is of wash and wear materials, the employee will be responsible for cleaning and maintaining the uniforms. Thus, the employees would have to piece together this isolated statement in an online handbook with any cleaning directions they received with their uniforms around a month later to come to the conclusion that their uniform allowance would be terminated.

Jones testified it was after AEPS and Paragon assumed operational control that he learned that he was no longer receiving an hourly uniform allowance. Jones testified he learned that, "When we got our first paycheck." Jones testified no one from the company had previously told him that he would not be receiving an hourly uniform allowance. Jones testified that AEPS had sent shoes to the site so Jones thought this would be taking the place of the prior shoe allowance. However, he testified that Paragon never sent shoes. Jones testified that prior to October 28 he was never told by a representative of either company that the shoe allowance would be discontinued but he was told this at a later date. Jones testified the typical length of their shift was 8 hours when he worked for USEC. Jones testified for that company when he was scheduled for 8 hours he was paid for 8 hours. Jones testified that when he worked for Paragon, prior to the parties agreeing to a new collective-bargaining agreement, when he worked 8 hours he was paid for 7 ½ hours. He testified the change was he was receiving an unpaid 30 minute lunch break, while he was paid for his lunch break by the prior employer. Jones testified that his lunch break first changed to being unpaid a couple of weeks after Paragon and AEPS took over the contract. Jones testified his breaks were not changed the first day of his employment.

Walker's first day working for AEPS was October 28. Walker testified that under the predecessor employers she did not receive any unpaid breaks. Walker testified that when she started working for AEPS her breaks remained the same, but they changed around the end of November or beginning of December 2013. Walker testified that, at that time, her breaks or her

daily hours were reduced by half an hour. Walker was aware other employees' breaks changed immediately under AEPS in her capacity as shop steward. Walker identified some of her AEPS pay stubs showing she was paid for her 30 minute lunch break through the end of November. Walker testified the uniform allowance was a line item in her pay stub when she worked for the predecessor employer. Walker testified that when she received her first paycheck for AEPS it did not have a line item for uniform allowance. Walker testified that in her capacity as shop steward she was made aware in 2014 that AEPS did not offer a shoe allowance.

The predecessor contract revealed as of January 2013, an SPO was receiving $26.76 per hour; a $.40 hourly uniform allowance; and $4.15 per hour for health and welfare, which they could opt to receive as directly paid to them as part of their paycheck. Based on 40 hours total their gross pay came to $1070.40 pay; $16 uniform allowance; $166 health and welfare for a total of $1252 for a 40 hour week. Following Respondent's takeover this same employee on a 40 hour week had the option of receiving only $1003.5. Thus, Respondent's had effectively reduced their option of gross weekly pay by $248.50 per week, close to a 20% cut. The Respondent's did this by bypassing the Union; and dribbling out information to the employees in an ambiguous and incomplete fashion. The employees also lost their $100 annual shoe allowance, and while the Respondent's provided shoes the testimony revealed those shoes were uncomfortable to the vast majority of the guards who were required to stand for substantial amounts of time, requiring them to purchase their own shoes. While Respondent's were required to contribute the health and welfare money to their health insurance plan, and the remainder or total amount placed in a designated 401(k) depending if the employee had outside health coverage, there is no showing if there was any vesting requirement for the 401(k) contributions; or what penalties the employees would have to overcome to get access to the money. Moreover, this was an immediate hit to the employees available gross income.

It can be argued that the employee no longer had to accrue dry cleaning expenses for wash and wear uniforms. On the other hand, this assumes the employees had free access to a washer/dryer on their premises. Rather, they may still have had cleaning costs for which they were no longer compensated as well as time for cleaning the uniforms. They could have also have found ways to dry clean the uniforms without spending the whole prior allowance. Regardless, their disposable gross income was substantially reduced when Respondents took over based on ambiguous and piece meal information given to the employees. I also note that Respondents took over the contract using basically the same supervision and staff; and it therefore appears the main efficiencies over the prior contractor were achieved by Respondent's ability to manipulate the employees' prior negotiated benefits. This does not appear to be the type of timely notice of a reduction in wages and benefits to employees for informed choices that the court was contemplating in *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB,* 595 F.2d 664, 674-676 (D.C. Cir. 1978).

In sum, I find Respondents became perfectly clear successors under *Spruce Up,* through their described course of conduct beginning on September 3, and through their September 14 memo to Paragon applicants requesting that they apply, and through their continued conduct with respect to AEPS applicants, as described above in soliciting their applications in September, while failing to clearly inform both sets of applicants that their benefits would change. In this regard, by thereafter failing to reach out and consult with the Union as to the proposed changes in wages benefits, and thereafter providing piecemeal information directly to the employees about those changes the Respondents have engaged in unilateral changes and bypassed and undermined the Union in violation of Section 8(a)(5) and (1) of the Act.

2.The General Counsel's Request that the Board Reverse *Spruce Up*

The General Counsel contends the Board's decision in *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), should be overturned as it is inconsistent with the language in the Court's decision in *NLRB v. Burns Security Services,* 406 U.S. 272, 294-295 (1972). The General Counsel requests that I issue an order urging the Board to revisit and overturn *Spruce Up*, and that Respondents be found to be "perfectly clear" successors as contemplated by *Burns* because the evidence establishes Respondents unquestionably intended to retain the predecessors' work force. The General Counsel argues that if *Spruce Up* is overturned the fact Respondents indicated at least some changed terms and conditions of employment in their offer letters preceding their assumption of operations at the USDA buildings becomes irrelevant. It is argued Respondents planned to retain the predecessors' work force and thus they should be found to be "perfectly clear" successors as defined by the Court in *Burns*. It is contended Respondents' bargaining obligation attached upon determining they would enter the service contract and rely predominantly on their predecessors' work force to meet their staffing needs, due to their obligation to offer incumbent employees a right of first refusal under Executive Order 13495. It is contended that, at that point, Respondents were obligated to notify the Union of their intention to change working conditions, and thereafter give the Union an opportunity to bargain. It is asserted that because Respondents intended to hire predecessors' work force in compliance with the Executive Order they were "perfectly clear" successors under *Burns* and violated section 8(a)(5) and (1) of the Act by failing to consult with the Union before fixing initial terms.

The General Counsel has as early as 2003 recommended the Board reverse its *Spruce Up* holding as reflected in *Elf Atochem North America, Inc.,* 339 NLRB 796, 803 (2003). The Board elected not to address the arguments made at that time. It appears the Board may now want to address the General Counsel's arguments because the disagreement between the two branches of the Agency, as it did here, helped to foster this litigation because the parties did not have clear guidelines with which to reach a resolution of their dispute. In *Elf Atochem North America, Inc.,* it was noted at 803 that the General Counsel asserted the Board should reverse *Spruce Up* and find an obligation to bargain exists over initial terms of employment whenever a successor plans to retain the existing workforce without regard to whether changes in employment conditions are contemplated or when they are announced. The General Counsel there cited *NLRB v. Advanced Stretchforming, Inc.,* 208 F.3d 801, 807-811 (9th Cir. 2000); Chairman Gould's concurring opinion in *Canteen Co.,* 317 NLRB 1052, 1054-1055 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), and the dissenting opinions of Board Members Fanning and Penello in the *Spruce Up* decision as support for the position that the case be reversed.

I find it unnecessary to recommend to the Board that *Spruce Up* be reversed as the General Counsel requests. This is a policy matter reserved to the Board. I will, however, provide the Board with an analysis of existing case law to the extent it might prove useful.[24] Some 13 years after the Board's *Spruce Up* decision, in *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 39-40 (1987), the Court stated:

> During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must

[24] I am aware that recently in *GVS Properties, LLC,* 362 NLRB No. 194 (2015), the Board cited the *Spruce Up* decision with approval. However, that case does not appear to include, as here, a contention by the General Counsel that *Spruce Up* be reversed.

bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer.[FN6] Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it.[FN7] Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

The Board and courts have also long held that by dealing directly with bargaining unit employees an employer unlawfully bypasses a union and in doing so undermines its representation status in the bargaining unit. See *Medo Photo Supply Co. v NLRB,* 321 U.S. 678, 683 (1944); *Georgia Power Co.,* 342 NLRB 199 (2004), enfd. 427 F.3d 1354 (11th Cir. 2005); and *Ken's Building Supplies,* 142 NLRB 235 (1963), enfd. 333 F.2d 84 (6th Cir. 1964). In *Medo Photo Supply Co. v. NLRB,* supra, at 683-685, the Court stated:

> The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see s 9(a) of the Act, 29 U.S.C. s 159(a), 29 U.S.C.A. s 159(a), it exacts 'the negative duty to treat with no other.' *National Labor Relations Board v. Jones & Laughlin,* 301 U.S. 1, 44, 57 S.Ct. 615, 628, 81 L.Ed. 893, 108 A.L.R. 1352; and see *Virginian Railway Co. v. System Federation,* 300 U.S. 515, 548, 549, 57 S.Ct. 592, 599, 600, 81 L.Ed. 789. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated s 8(1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.
>
> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a majority, with respect to wages, hours and working conditions was recognized by this Court in *J.I. Case Co. v. Labor Board,* 321 U.S. 332, 64 S.Ct. 576; cf. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342, 64 S.Ct. 582; see also *National Licorice Co. v. Labor Board,* 309 U.S. 350, 359-361, 60 S.Ct. 569, 575, 576, 84 L.Ed. 799. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by s 7 and a violation of s 8(1) of the Act.[FN2]

There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation. Compare *National Labor Relations Board v. Century Oxford Mfg. Co.,* 2 Cir., 140 F.2d 541. But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation.

In *Fall River Dyeing & Finishing Corp. v. NLRB,* supra at 42, the Court stated the following pertaining to Board action in successorship cases:

> We turn now to the three rules, as well as to their application to the facts of this case, that the Board has adopted for the successorship situation. The Board, of course, is given considerable authority to interpret the provisions of the NLRA. See *NLRB v. Financial Institution Employees,* 475 U.S. 192, 202, 106 S.Ct. 1007, 1012, 89 L.Ed.2d 151 (1986). If the Board adopts a rule that is rational and consistent with the Act, see *ibid.,* then the rule is entitled to deference from the courts. Moreover, if the Board's application of such a rational rule is supported by substantial evidence on the record, courts should enforce the Board's order. See *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). These principles also guide our review of the Board's action in a successorship case. See, *e.g., Golden State Bottling Co. v. NLRB,* 414 U.S., at 181, 94 S.Ct., at 423.

As well documented in this decision, and in many others, in *NLRB v. Burns Services Inc.*, 406 US 272, 281-282 (1972), the Court stated "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."

In *Spruce Up Corporation,* supra at 195, the Board majority stated:

> Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was going to be paying different commission rates. Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms. When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him-a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.
>
> We concede that the precise meaning and application of the Court's caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow

> from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish-nor do we believe the Court wished-to discourage continuity in employment relationships for such legalistic and artificial considerations. We believe the caveat in *Burns,* therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,[FN7] or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

The principles set forth by the majority in *Spruce Up* do not translate easily to the circumstances here, which could not have been foreseen by the majority at the time *Spruce Up* issued. First, the respondent in *Spruce Up* informed the union there on February 6, that "all the barbers who are working will work." However, the union was also informed at that time what the respondent planned to pay the barbers. The new commission rates were unsatisfactory to the many of the barbers leading to a strike. Thus, during the first meeting the employer clearly indicated it was altering a core term of employment; and it let the union know the new rate. It did not make the type of ambiguous statement the progeny of *Spruce Up* has morphed into as sufficient to deprive employees bargaining rights such as "at will"; or the statements put forth here such as we reserve the right to change working conditions without specifying the change, or even that there definitely would be a change.

Secondly, the Board majority's concern that to retain the right to set initial conditions an employer would have to "refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms," is inapplicable to the current category of employees, because the Executive Order gives them the right of first refusal to their current positions so whether the Respondent comments favorably about their retention or not has nothing to do with the continuity of their employment relationship. Thus, the underpinning of the majority of the *Spruce Up* rationale is not applicable here. It surely, cannot outweigh the fact as enunciated by the Court that failure to recognize a union during a successorship transition serves to undermine the union; which is further compounded when while stripping the employees of representation during this transition period, the successor employer is encouraged to engage in direct dealing with those employees, although it plans to hire, or is required to hire those employees thereby subsequently being required to recognize and bargain with the union. See the Courts pronouncements in *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 39-40, (1987); *Medo Photo Supply Co. v. NLRB,* supra, at 683-685; and *Burns* itself stating, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." The Court added no qualification to that requirement, and even in circumstances when a successor employer is forthright in detailing early on its plans to alter the predecessor's benefits, its discussing those planned changes with the union in place with a give and take may in fact help it to maintain its plans to keep the predecessors staff through the ameliorative effects of collective bargaining. As detailed by the dissent in *Spruce Up* such a process does not prevent an employer from bargaining to a lawful impasse to place its initial terms in effect, but the employees will be given a fair option of knowing the specifics of the employer's offer in advance,

and be more secure in the fact that they have not been stripped of union representation in the process.

With respect to this class of government contract employers they are required to set wages and benefits in part based on the predecessor's CBA under the SCA; and give a right of first refusal to those employees under the executive order. As set forth above, the main concern of the *Spruce Up* majority that requiring successors to bargain during the transition period when their plans entail hiring a majority of the predecessor's, may make them not comment favorably about those employees hiring prospects is not relevant as the employees here are already assured a job offer. Moreover, the current *Spruce Up* standard potentially strips away bargaining rights for large groups of employees during a sensitive period for a union as well as those employees, as the evidence reveals that AEPS is a nationwide employer with 26 federal contracts. In this instance, the single contract with USDA involved guards employed at multiple buildings two of which involved a fairly significant number of bargaining unit employees. Similarly, Baker's testimony revealed that since 2008, Paragon has taken over more than 50 federal contracts from competitors; that Paragon is in 42 states and in some U.S. territories; and that 90% of Paragon's work force is represented by unions, encompassing around 20 unions. For the reasons set forth above, the underpinnings of the majority's rationale in *Spruce Up* does not appear to apply to this group of employers; and there appears no basis to undermine the Union here; and in similar circumstances to strip employees of their right representation when the successor is required proffer them an offer of employment.

However, the *Spruce Up* majority's concerns also can be questioned concerning employers in general. The Board majority surmised that employers who might want to preserve their *Burns* right to set initial terms would "have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms." This conclusion seems to be somewhat undermined by the fact if it is in the employer's interest to keep predecessors work force in tact due to their skills, training, expertise, knowledge of the operation, client goodwill, lack of availability of adequate substitutes, time targets in resuming or maintaining operations, or any number of a variety of factors that would come into play in such a decision it would appear the employer would have to let the employees know about it sooner than later to retain their services. The *Spruce Up* majority also went on to state, "And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent." However, the failure to offer predecessor employees employment to avoid a statutory bargaining obligation is a violation of Section 8(a)(3) and (1) of the Act. It seems to be a slender reed to eviscerate employees important representation rights because an employer may be tempted to violate the Act in another fashion. This can be construed as giving an employer a pass on its obligations under Section 8(a)(5); so it will not be tempted to violate Section 8(a)(3) of the Act. The Board is capable of upholding the rights of both sections of the Act; does not have to sacrifice one at the expense of the other; and it is likely that the vast majority of employers will voluntarily comply if those rights are clearly delineated in cases of this context.

Member Fanning took the view in his dissent in *Spruce Up* that, "The fact that some employees may refuse the offer of employment has nothing to do with the 'plans' or intent of the offering employer." It was stated, "Nor can there be any economic injury to the successor in bargaining in good faith prior to the commencement of operations, for, assuming good-faith bargaining on his part, if the union cannot persuade him that other terms are more equitable, he is perfectly free to impose those terms as the opening terms and conditions of employment upon the commencement of operations." It was pointed out, "The majority's contrary construction of this aspect of the *Burns* decision leads to the anomalous, if not absurd, result that a bargaining

obligation over the establishment of the successor's initial terms and conditions of employment arises when the successor plans to retain the former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear 'the mediatory influence of negotiation'[FN38] where there is no controversy, but deny its appropriate use where there is controversy. They thus turn the Act on its head, and to no useful end." *Spruce Up,* supra at 205-206.

Similarly, Member Penello pointed out that in *Burns* "The Court there said nothing about a conditional intent to hire." In agreement with Member Fanning, he stated, "The majority are attempting to revise substantially what the Court said, for their view would, in effect, abrogate the exception, as the only case when a violation would occur under their test would be the unlikely situation where a successor says he will continue the employees under the exact terms and conditions as existed before the takeover. If he says that he 'plans' to alter the status quo in any way, while at the same time indicating a desire to retain the old employees, they would find this amounts to a conditional intent to hire. I cannot accept that the Supreme Court would announce a rule of law that is so restrictive as to amount to a nullity." It was stated as to the successor's obligation to consult with the employees bargaining representative before he fixes terms "I regard this duty as merely an obligation to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse. Having thus negotiated with the union, the successor is then free to fix his terms whether the union agrees or not. In my view this is not too heavy a burden to put on any employer in order to protect the employees' Section 7 rights 'to bargain collectively through representatives of their own choosing' with respect to matters affecting the employees' interests." Id. 207-208.

In *Canteen Co.* supra at 1054-1055, Chairman Gould stated, in a concurring opinion that "I write separately, however, to express my opinion that the *Spruce Up* standard represents an unduly restrictive reading of the Supreme Court's definition of circumstances in which a successor employer must bargain about initial terms and conditions of employment." The chairman stated, "I question the validity of *Spruce Up* and believe that it grafts on an additional requirement for finding a 'perfectly clear' successor which is neither warranted nor intended by the Supreme Court in *Burns*. The Supreme Court stated that the test was only whether 'the new employer plans to retain all of the employees in the unit' for the new employer to be a 'perfectly clear' successor." The Chairman agreed with Member Fanning and Penello's prior dissents, stating:

> The fact is that in many, if not most, business rearrangements, the successor employer perceives a need for change or greater flexibility in the employment relationship. This is the essential dynamic involved in the instant case as well as countless others. To eliminate instances where employers express an intent to provide changed employment conditions from the obligation to negotiate under the "perfectly clear" standard announced in *Burns* would both render the holding on this point meaningless and also disregard the careful balance between competing interests articulated by the Court in both *Burns* and *Fall River Dyeing*.

In *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB,* 595 F.2d 664, 674-675 (D.C. Cir. 1978), the court similarly stated pertaining to the effect of the Board majority's *Spruce Up* doctrine that "To be sure, in view of the substantial harmony existent in the parties' positions, only minor adjustments in initial terms may then remain to be negotiated, and it must be acknowledged that compulsory bargaining usually yields greater returns when labor-management differences are of more appreciable magnitude." Thus, the court acknowledged the

limited nature of the bargaining remaining under *Spruce Up* decision as pointed out by Members Fanning, Penello; and Chairman Gould. The court, however, went on to state in affirming the Board majority's *Spruce Up* analysis that in basic fairness to employees that unless incumbent employees "are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force."

Here, the executive order required Respondents to accord incumbents first refusal for their positions; the SCA required that the Respondents be presented with the predecessor's CBA and for Respondent's to analyze that CBA to make sure they complied with the SCA in according the incumbent employees lawfully required wages and benefits. As early as September 3, a notice was posted announcing certain named employees would be requested to attend Paragon's job fair. At that time, employees whose names were not listed were told they would be contacted by AEPS for them to apply with that employer. A clear signal to employees that Respondents had made a decision as to which employees were to work for each employer, which given the executive order could only lead the employees to believe they would be offered job opportunities. The Paragon employees who elected to attend the September 14 job fair were required to fill out an application, which stated they were to be hired as employees at will, and that Paragon retained the right to change existing terms and conditions of employment. They were not told that Paragon actually intended to make changes to core terms of employment, or if so, what those changes would be. They were told to bring a substantial amount of documentation with them to the job fair in the job fair announcement, and that they would have to meet certain employment related requirements, most of which they had met to be hired and retain employment with the predecessor contractor. For those who attended the September 14, job fair, they were given a contingent offer letter, which indicated they would lose the ability to retain health and welfare contributions as a form of wages; but they were not told specifically that they would no longer be paid for their 30 minute lunch break, or that they would lose their uniform or shoe allowance. The AEPS applicants, who it turned out to be the vast majority of employees here, were not told anything about their new employment conditions until after September 23, when they were required to provide their email addresses; and then were emailed a link to apply. The application only stated they would be employees at will, but did not state anything about changes in wages or fringe benefits. Thus, while the Respondents had the predecessors CBA early on, the AEPS applicants were not told anything specific about substantive changes in core benefits until October 17, when they received their offer letters, less than 2 weeks before they were to start employment with their new employer. As I have found above, information continued to be presented to them thereafter in a piecemeal fashion concerning substantive wage and benefit changes some of it being gleaned after they started their new jobs.

It is likely, that anyone reading this decision, if they are changing jobs, would want to have a clear presentation from their prospective employer specifically what their new wages and fringe benefits would be, to make a reasoned decision with their families and in a timely enough fashion to preserve their options of seeking alternative employment if the new wage and benefit package proved unsatisfactory. Here, the employees were instead presented with legal constructs, for which legal minds debate the significance, and then siphoned out information in a manner in which the Respondents determined would arguably meet the Board's standards in order to dilute the effect of Respondents' planned changes and undercut the ability of the employees to seek alternate employment. At the same time the employees were stripped of union representation during this transition period.

I would note that in *Burns,* the Court stated, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he

fixes terms." The affirmative duty to consult was placed on the employer, for it is the employer that knows its plans as to employee retention and changes of benefits. Here, there was no demand by the Union to bargain over the initial terms of employment prior to Respondents beginning operations. However, the Respondents have not raised lack of such a demand as a defense in their answer, at the trial, or in their post-hearing brief. Had it been raised, I would have recommended its rejection, because the Court's pronouncement places an affirmative duty on the employer to consult with the union. Along these lines, this is similar to direct dealing when an employer unlawfully by passes a union concerning changes to terms of employment and deals directly with employees. It appears, under the Court's intent under *Burns* a perfectly clear successor would be required to inform the union specifically what changes in the current benefits it intends to make, in a timely fashion, and then bargain with the union to impasse before implementing those changes. Under the current *Spruce Up* rationale when employers intend or are required to hire the predecessor's work force, employees can be both denied union representation at a vulnerable period, and as well of the specifics of their new employment arrangement so they cannot make informed judgments as to their future. It would seem that both of these ends would serve to undermine a sitting union in the eyes of employees, and the bargaining process in general.

CONCLUSIONS OF LAW

1. Respondents, Paragon Systems, Inc. (Paragon) and American Eagle Protective Services Corp. (AEPS) are joint employers each individually engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Government Security Officers of America, Local 034, (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the following described unit has been an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time security officers employed at the United States Department of Agriculture Headquarters Complex located at 1400 Independence Ave., SW, Washington, DC; excluding all other employees, including corporals, sergeants, lieutenants, captains, managers, and supervisors as defined in the Act.

4. At all material times, the Union has been, and is now, the exclusive representative for the employees in the bargaining unit described above in paragraph 3 (the unit employees) for the purposes of collective-bargaining within the meaning of Section 9(a) of the Act.

5. Respondents, joint employers and perfectly clear successor employers, violated Section 8(a)(5) and (1) of the Act by failing to follow certain terms and conditions of employment and related past practices set forth in the collective-bargaining agreement between USEC Inc. and Securiguard, Inc., joint employers, and the Union for the unit employees, the effective dates of which were October 1, 2011 through September 30, 2014, by unilaterally changing the following terms and conditions of employment without providing the Union with notice and an opportunity to bargain over: (a) eliminating a paid 30-minute employee lunch break, thereby causing a reduction in employee work hours; (b) eliminating the hourly uniform allowance; (c) eliminating the shoe reimbursement allowance; (d) redefining the threshold for full-time employment status from 32 hours per week to 40 hours per week; (e) discontinuing the employee option to receive the hourly health and welfare benefit as a wage in the employee paycheck; (f) changing pay dates from biweekly to twice monthly; and (g) reducing the pay rate earned by employees while in training.

6. The unfair labor practices described above constitute unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents, as joint employers, have engaged in conduct violating Section 8(a)(5) and (1) of the Act, they are ordered to cease and desist therefrom, and to take the following affirmative action deemed necessary to effectuate the policies of the Act. I shall also recommend that Respondents be held jointly and severally liable for all claims resulting from the unfair labor practices found here.

Respondents are ordered to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of their employees in the unit found here to be appropriate. The parties voluntarily reached a new collective-bargaining agreement effective October 16, 2014. Thus, I find Respondents liable to employees and employees should be made whole for losses resulting from the unilateral changes found here for the period October 28, 2013 to October 16, 2014, the effective date of the new CBA. See *Elf Atochem, Inc.,* 339 NLRB 796, 796 fn. 4 (2003). I do not find it necessary to parse out any of the specific changes that may not have been mentioned in the new collective-bargaining agreement as the General Counsel urges, for the Union should have been aware of those changes at the time it entered its agreement with Respondent, yet voluntarily entered into that contract. Thus, employees affected by Respondents' unilateral changes, should be made whole for losses incurred during the period of October 28, 2013 through and including October 16, 2014 as a result of those unlawful changes, and Respondents should be ordered to make unit employees whole for such losses plus interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).[25] Respondents shall then, for each affected employee, file a report with the Social Security Administration allocating backpay to the appropriate calendar quarter, and shall compensate each affected employee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award covering periods for longer than one year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Included in this recommended remedy is the requirement that, upon request of the Union on behalf of any particular affected employees, employees may receive, as a lump-sum payment, the total amount of health and welfare contributions made on the employees' behalf by Respondents to each employee's 401(k) account between October 28, 2013 and October 16 2014. Respondent shall bear all costs, fees, and tax consequences for withdrawal of said monies from employees' 401(k) accounts.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

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[25] The recommended remedy shall also include Respondents reimbursing employees at their regular rate of pay for all training taking place at Respondents October 19 and October 26, 2013 orientation sessions to the extent employees were compensated by Respondents for attending those sessions, and, if so, if Respondents compensated employees for attending those sessions at less than their regular hourly rate of pay.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

It is hereby ordered that Respondents American Eagle Protective Services Corp. and Paragon Systems, Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Refusing to bargain in good faith with United Government Security Officers of America, Local 034, concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

> All full-time and regular part-time security officers employed at the United States Department of Agriculture Headquarters Complex located at 1400 Independence Ave., SW, Washington, DC; excluding all other employees, including corporals, sergeants, lieutenants, captains, managers, and supervisors as defined in the Act.

b. Unilaterally changing terms and conditions of employment established by the predecessor employers' collective-bargaining agreement and practices related thereto in effect during the period of October 1, 2011 through September 30, 2014.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit.

b. On the request of the Union on behalf of any or all affected employees, pay the employees, as a lump-sum payment, the total amount of health and welfare contributions made on the employees' behalf by Respondents to the employee's 401(k) account between October 28, 2013 and October 16, 2014. Respondents shall pay all costs, fees, and tax consequences associated with the withdrawal of these monies from employees' 401(k) accounts.

c. Make employees, in the above-described unit, whole for any losses they may have suffered as a result of the unilateral changes in their terms and conditions of employment during the period from October 28, 2013 through and including October 16, 2014, in the manner set forth in the remedy section of this decision.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at their operations at 1400 Independence Ave., SW copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, either of the Respondents goes out of business or is displaced as the security guard contractor or subcontractor at the facilities involved in this proceeding, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former bargaining unit employees employed by the Respondents at any time since October 28, 2013.

f. Notify the Regional Director, in writing, within 20 days from the date of this Order what steps Respondents have taken to comply.

Dated, Washington, D.C. September 22, 2015.

Eric M. Fine
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with United Government Security Officers of America, Local 034 as the exclusive bargaining representatives of employees in the following unit:

> All full-time and regular part-time security officers employed at the United States Department of Agriculture Headquarters Complex located at 1400 Independence Ave., SW, Washington, DC; excluding all other employees, including corporals, sergeants, lieutenants, captains, managers, and supervisors as defined in the Act.

WE WILL NOT unilaterally change terms and conditions of employment established by collective-bargaining agreements and practices in effect related to those agreements between the Union and our predecessors.

WE WILL, on request, bargain with the Union as the exclusive bargaining representative of the above-described bargaining unit.

WE WILL, jointly and severally, make whole employees in the above-described unit for any losses suffered between October 28, 2013 through October 16, 2014, as a result of our unilateral changes in their terms and conditions of employment, plus interest, as required in the remedy section of the Board's decision, including our during this time period: (a) eliminating a paid 30-minute employee lunch break; (b) eliminating the hourly uniform allowance; (c) eliminating the shoe reimbursement allowance; (d) redefining the threshold for full-time employment status from 32 hours per week to 40 hours per week for Paragon employees; (e) discontinuing the employee option to receive the hourly health and welfare benefit as a wage in the employee paycheck; (f) changing pay dates from biweekly to twice monthly for AEPS employees; (g) and reducing the pay rate earned by employees while in training.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

AMERICAN EAGLE PROTECTIVE SERVICES CORP. AND
PARAGON SYSTEMS, INC., SINGLE AND JOINT EMPLOYERS
(Employer)

Dated _____ By _____
(Representative American Eagle Protective Services Corp.) (Title)

Dated _____ By _____
(Representative Paragon Systems, Inc.,) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-126739 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.